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No. _____

In The

Supreme Court of the United States

October Term, 1997

THE STATE OF TEXAS,

Petitioner,

vs.

BRUCE FERNANDEZ,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeals For The Fourth Court Of Appeals District Of Texas

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Texas courts have misconstrued the decisions of *Burks v. United States*, *Greene v. Massey*, and *Tibbs v. Florida* by ordering an acquittal when the conviction is reversed on appeal solely due to the failure to sufficiently corroborate accomplice witness testimony, a clear state-law requirement that does not constitute an element of the offense.

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Fourth Court of Appeals District of Texas.

OPINION BELOW

The opinion of the Court of Appeals has been designated for publication, but has yet to be reported. It is reproduced in the Appendix at 1. The order of the Court of Appeals designating the opinion for publication is in the Appendix at 50.

JURISDICTION

The Court of Appeals issued its opinion and judgment on January 21, 1998. The State timely filed a motion for rehearing on January 30, 1998, which was overruled on February 18, 1998. The State timely filed a petition for discretionary review on February 19, 1998. The Court of Criminal Appeals refused the petition on July 8, 1998. Jurisdiction in this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States, in pertinent part:

> . . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb. . . .

Vernon's Ann.C.C.P. art. 38.14 (Vernon 1979):

> A conviction cannot be had upon the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant with the offense committed; and the corroboration is not sufficient if it merely shows the commission of the offense.

V.T.C.A., Penal Code § 29.02, in pertinent part:

> (a) A person commits an offense if, in the course of committing theft as defined in Chapter 31 and with intent to obtain or maintain control of the property, he:
>
> (1) intentionally, knowingly, or recklessly causes bodily injury to another; or
>
> (2) intentionally or knowingly threatens or places another in fear of imminent bodily injury or death.

V.T.C.A., Penal Code § 29.03, in pertinent part:

> (a) A person commits an offense if he commits robbery as defined in Section 29.02, and he:
>
> (1) causes serious bodily injury to another;
>
> (2) uses or exhibits a deadly weapon; or

(3) causes bodily injury to another person or threatens or places another person in fear of imminent bodily injury or death, if the other person is:

(A) 65 years of age or older; or

(B) a disabled person.

STATEMENT OF THE CASE

The evidence

The appellant, Bruce Fernandez, was charged in a simple indictment with two counts of aggravated robbery. A jury found the appellant guilty and his punishment was assessed at 20 years imprisonment on each count. On original submission, the Court of Appeals sustained the appellant's first point of error, in which he alleged that the trial court erred in denying his motion for an instructed verdict of not guilty because the State failed to corroborate the testimony of an accomplice witness.

The opinion below; how the federal issue was raised

Having found the evidence insufficient to sustain the conviction, because of the failure to corroborate accomplice testimony, pursuant to the perceived mandate of *Burks v. United States*, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978), and *Greene v. Massey*, 437 U.S. 19, 98 S.Ct. 2151, 57 L.Ed.2d 15 (1978), the Court of Appeals ordered an acquittal to be entered for each count.

The State's motion for rehearing in the Court of Appeals argued that the court had made an improper

disposition by ordering entry of an acquittal, instead of remanding the case for a new trial. The motion was overruled without opinion. App. 14 thru 29.

The State's petition for discretionary review to the Court of Criminal Appeals likewise contended that the Court of Appeals incorrectly applied federal constitutional principles by ordering entry of an acquittal. The State's petition was refused. App. 31 thru 50.

REASONS FOR GRANTING THE WRIT

This case presents an important issue of federal law that will have sweeping application across numerous jurisdictions in this country. The courts of the state of Texas, as well as those of several other states, have been ordering that acquittals be entered in cases where the courts have determined the evidence to have been insufficient, not because the evidence failed to comply with constitutional sufficiency requirements, but instead, solely due to reasons of state law – i.e., that there was a failure to corroborate the testimony of an accomplice witness according to a state-law requirement.

Although these courts have held the evidence to be insufficient on state-law grounds, they have also held that in such cases, the federal Double Jeopardy Clause mandates an acquittal in such cases, pursuant to this Court's decisions in *Burks v. United States*, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978), and *Greene v. Massey*, 437 U.S. 19, 98 S.Ct. 2151, 57 L.Ed.2d 15 (1978). We perceive the misunderstanding of the applicable principles to be due in large part to the fact that the Court has never

clearly enunciated the specific standard by which the evidence is to be gauged before federal double jeopardy principles are implicated. Even in its decision in *Tibbs v. Florida*, 457 U.S. 31, 102 S.Ct. 2211, 72 L.Ed.2d 652 (1982), while holding that the Florida standard governing the weight of the evidence did not trigger a double jeopardy bar to reprosecution, the Court did not expressly pronounce what constitutes the applicable standard.

The various courts across the nation need this guidance from the Court.

I. The Court of Appeals for the Fourth Court of Appeals District of Texas has decided an important question of federal law that has not been, but should be, settled by this Court, to-wit: What is the applicable standard by which the sufficiency of the evidence should be determined in order to trigger the prohibition against reprosecution pursuant to the Double Jeopardy Clause?

In *Burks v. United States, supra*, and *Greene v. Massey, supra*, this Court held that when the evidence is determined to be legally insufficient to sustain the conviction, the Double Jeopardy Clause precludes reprosecution for that offense. However, what has not been expressly articulated is the standard to be employed to determine when the State's evidence is so deficient that a retrial is barred. Is the standard the minimal due process standard of *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)? Or, is it enough that the State's evidence failed to comply with a *state law* that governs the authority to convict? Or, instead, is the standard at some point in between?

In *Jackson v. Virginia, supra,* the Court held that the evidence would be considered sufficient to meet due process requirements if any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. And, in both *Burks* and *Greene,* it is clear that this Court was considering situations in which the State's evidence failed to comply with that standard. What is not clear from *Burks* and *Greene* is whether the Court was limiting its holding to such inadequacies in the prosecution's evidence, or whether that just happened to be the circumstances presented in those cases.

While we are not aware of any definitive holding by the Court on this issue, we believe that the appropriate standard is the minimal due process requirement of *Jackson v. Virginia.* If that conclusion is correct, then the State's evidence in this case is not legally insufficient according to federal law, such that a double jeopardy bar to reprosecution would be triggered, because a corroboration requirement of accomplice testimony, such as that contained in Vernon's Ann.C.C.P. art. 38.14, is not required by the United States Constitution in order to meet minimal due process requirements. *See, Caminetti v. United States,* 242 U.S. 470, 37 S.Ct. 192, 61 L.Ed. 442 (1917).[1] *See also, Thompson v. State,* 691 S.W.2d 627 (Tex. Crim. App. 1984), cert. den., 474 U.S. 865, 106 S.Ct. 184, 88 L.Ed.2d 153 (1985).

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[1] It is also significant that Art. 38.14 does not speak in terms of an "acquittal." Instead, it reads "[a] conviction cannot be had. . . . " Therefore, the requirement of that statute cannot be considered as an element of the offense; nor can a reversal on appeal for failure to comply with Art. 38.14 be considered as an implied acquittal of the offense.

II. The Court of Appeals for the Fourth Court of Appeals District of Texas has decided an important federal question in a way that conflicts with relevant decisions of this Court, i.e., that where a conviction is reversed on appeal because of insufficient evidence, due solely to the failure to sufficiently corroborate accomplice testimony, the proper remedy is the entry of an acquittal and a double jeopardy bar to reprosecution.

The conclusion that a failure to meet a state-law requirement that accomplice testimony be corroborated does not result in a jeopardy bar to reprosecution is buttressed by the Court's decision in the case of *Tibbs v. Florida, supra*. At the time, a Florida appellate rule authorized an appellate court to review the evidence in a death sentence case to determine if the interests of justice required a new trial, regardless of whether the insufficiency of the evidence was a ground of appeal. Pursuant to that rule, the Florida Supreme Court had determined in *Tibbs* that, although the evidence was legally sufficient to meet the requirements of *Jackson v. Virginia*, weaknesses in the prosecution's evidence required a new trial in the interests of justice. This Court ruled that when an appellate court so concludes that a guilty verdict is against the *weight* of the evidence, as opposed to being legally *insufficient*, the Double Jeopardy Clause does not bar the prosecution from a retrial.

Although the Court again, as in *Burks* and *Greene*, was not explicit regarding the applicable standard of evidentiary insufficiency necessary to invoke a double jeopardy bar to retrial, the implications from the Court's language support the conclusion that it is the *Jackson v.*

Virginia legal insufficiency standard that is to apply. First, this Court stated in the following language the holding of the Florida Supreme Court that it was to review, and ultimately affirm:

> Having found that it could not "fairly conclude . . . that Tibbs' convictions were reversed on the grounds of evidentiary insufficiency," *id.*, at 1127, the Florida Supreme Court held that *Greene* and *Burks* do not bar retrial. Those decisions, the court believed, as well as *United States v. DiFrancesco*, 449 U.S. 117, 101 S.Ct. 426, 66 L.Ed.2d 328 (1980), interpret the Double Jeopardy Clause to preclude retrial after reversal of a conviction only when the appellate court has set the conviction aside on the ground that the evidence was legally insufficient to support conviction. Other reversals, including those based on the weight of the evidence or made in the "interests of justice," do not implicate double jeopardy principles.

Tibbs v. Florida, 457 U.S. at 39, 102 S.Ct. at 2216, 72 L.Ed.2d at 659.

Also, the Court described its previous holdings in *Burks* and *Greene* in the following manner:

> *Burks v. United States* and *Greene v. Massey* carved a narrow exception from the understanding that a defendant who successfully appeals a conviction is subject to retrial. In those cases, we held that the Double Jeopardy Clause precludes retrial "once the reviewing court has found the evidence legally insufficient" to support conviction. This standard, we explained, "means that the government's case was so lacking that it should not have even been *submitted* to the

> jury." *Burks*, 437 U.S., at 16, 98 S.Ct., at 2149 (emphasis in original). A conviction will survive review, we suggested, whenever "the evidence and inferences therefrom most favorable to the prosecution would warrant the jury's finding the defendant guilty beyond a reasonable doubt. In sum, we noted that the rule barring retrial would be "confined to cases where the prosecution's failure is clear." *Burks, supra*, at 17, 98 S.Ct., at 2150.

Tibbs v. Florida, 457 U.S. at 40-41, 102 S.Ct. at 2217, 72 L.Ed.2d at 660-61. (Citations omitted).

Moreover, the Court in *Tibbs* made specific reference to the Due Process Clause's standard of evidentiary sufficiency decided in *Jackson v. Virginia*. This reference was made in response to the petitioner's contention that a distinction between the weight and the sufficiency of the evidence would undermine the *Burks* rule by encouraging appellate judges to base reversals on the weight, rather than the sufficiency, of the evidence. The context in which this reference was made is also an indication that the Court was making a distinction, for purposes of double jeopardy, between cases determined to be deficient due to evidentiary weight or due to legal insufficiency, and that it considered the *Jackson v. Virginia* threshold as the mark for any triggering of double jeopardy limitations on reprosecution. *Tibbs v. Florida*, 457 U.S. at 44-45, 102 S.Ct. at 2219-20, 72 L.Ed.2d at 663.

Any ambiguity regarding the appropriate standard of evidentiary insufficiency that might persist from the majority opinion in *Tibbs* is allayed by Justice White's dissenting opinion in the case. Justice White believed the

"trump card" in this analysis to be the court's assertion in *Burks* that the Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding. According to Justice White, since either situation, whether it involved evidence deemed legally insufficient under the federal due process standard or evidence determined to be inadequate on state law grounds, involved the failure of the State to present evidence adequate to sustain the conviction, the double jeopardy implications of each situation should be the same. Obviously, the majority of the Court rejected this interpretation. However, more important to the issue in this case is Justice White's assertion of what the court's majority was holding. To illustrate this point, we quote at length from portions of the dissenting opinion:

> The majority concedes, as it must under *Burks, supra*, that if the State's evidence failed to meet the federal due process standard of evidentiary sufficiency, the Double Jeopardy Clause would bar reprosecution. The majority fails to explain why the State should be allowed another try where its proof has been held inadequate on state-law grounds, when it could not do so were it inadequate on federal-law grounds.
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> * * *
>
> The majority offers two arguments in its attempt to distinguish the two cases. First, it emphasizes that the Double Jeopardy Clause "attaches special weight to judgments of acquittal." . . . Second, the majority thinks it to be of some significance that when the evidence is

> determined to be insufficient as a matter of federal law, then no rational factfinder could have voted to convict on that basis. On the other hand, when the conviction is reversed on the basis of the state-law rule applying a "weight of the evidence" test, that "does not mean that acquittal was the only proper verdict." *Ante*, at 2218. The constraints of the Double Jeopardy Clause, however, do not depend upon a determination that an "acquittal was the only proper verdict." The fact remains that the State failed to prove the defendant guilty in accordance with the evidentiary requirements of state law.
>
> * * *
>
> . . . That the proof fails on state-law, rather than federal-law grounds is immaterial to these policy considerations.

Tibbs v. Florida, 457 U.S. at 48-50, 102 S.Ct. at 2222-23, 72 L.Ed.2d at 665-67 (White, J., dissenting).

Justice White certainly understood the majority of the Court in *Tibbs* to be making the relevant distinction between cases determined to be inadequate on federal-law grounds, i.e., legal insufficiency of the evidence, and those held inadequate on state-law grounds.

Additional support for the proposition that double jeopardy implications arising from an insufficiency of the evidence are to be governed by the federal due process standard of *Jackson v. Virginia* can be found in the language utilized by this Court in other decisions. For example, in *United States v. Scott*, 437 U.S. 82, 98 S.Ct. 2187, 57 L.Ed.2d 65 (1978), which was handed down the same day as were *Burks* and *Greene*, the Court was interpreting a

federal statute which prohibited appeals by the government of the dismissal of an indictment if the Double Jeopardy Clause prohibited further prosecution. There, the Court said:

> . . . Despite respondent's contentions, an appeal is not barred[2] simply because a ruling in favor of a defendant "is based upon facts outside the face of the indictment," *id.*, at 348, 95 S.Ct., at 1024, or because it "is granted on the ground . . . that the defendant simply cannot be convicted of the offense charged," *Lee*, 432 U.S., at 30, 97 S.Ct., at 2146. Rather, a defendant is acquitted only when "the ruling of the judge, whatever its label, actually represents a resolution [in the defendant's favor], correctly or not, of some or all of the factual elements of the offense charged," *Martin Linen, supra*, 430 U.S., at 571, 97 S.Ct., at 1355. Where the court, before the jury returns a verdict, enters a judgment of acquittal pursuant to Fed.Rule Crim.Proc. 29, appeal will be barred only when "it is plain that the District Court . . . evaluated the Government's evidence and determined that it was legally insufficient to sustain a conviction." 430 U.S., at 572, 97 S.Ct., at 1355.

United States v. Scott, 437 U.S. at 96-97, 98 S.Ct. at 2197, 57 L.Ed.2d at 78.

In other decisions, this Court has indicated that the threshold of evidentiary insufficiency established in *Burks* for precipitating double jeopardy implications is *legal insufficiency* of the evidence. *See, e.g., Hudson v. Louisiana,*

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[2] In other words, there is no double jeopardy bar to reprosecution.

450 U.S. 40, 43, 101 S.Ct. 970, 972, 67 L.Ed.2d 30, 33-34 (1981); *Smalis v. Pennsylvania*, 476 U.S. 140, 142, 106 S.Ct. 1745, 1747, 90 L.Ed.2d 116, 120-21 (1986). Moreover, there does not appear to have been any dispute on the Court regarding this principle. Justice Brennan, in his dissenting opinion in *Justices of Boston Municipal Court v. Lydon*, 466 U.S. 294, 104 S.Ct. 1805, 80 L.Ed.2d 311 (1984), characterized the standard required to invoke a double jeopardy bar to reprosecution as one of "constitutional insufficiency":

> The decision in *Burks*, therefore, is not merely an application of an abstract concept of "continuing jeopardy." Instead, *Burks* derives from "[p]erhaps the most fundamental rule in the history of double jeopardy jurisprudence" – that a " 'verdict of acquittal . . . [can]not be reviewed, on error or otherwise, without putting [a defendant] twice in jeopardy, and thereby violating the Constitution.' " . . . Unlike a reversal for trial error, a reversal for constitutionally insufficient evidence represents a determination that, notwithstanding the verdict to the contrary, no "rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt," *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 450 (1979), and therefore the defendant was *entitled* to a judgment of acquittal as a matter of law.
>
> * * *
>
> Because the first trial has plainly ended, "retrial is foreclosed by the Double Jeopardy Clause if the evidence fails to satisfy the [constitutional standard for sufficiency]. Hence, the [sufficiency] issue cannot be avoided; if retrial is to be had, the evidence must be found to be legally sufficient, as a matter of federal law, to sustain the jury verdict."

Id., 466 U.S. at 318-22, 104 S.Ct. at 1818-20, 80 L.Ed.2d at 331-32. (Brennan, J., dissenting).

The above-cited language from *United States v. Scott*, together with the Court's language utilized in other decisions, represents a further indication that the effect of this Court's decisions in *Burks* and *Greene* is that in order to invoke a double jeopardy bar to reprosecution, the prosecution's evidence must fail to meet the due process requirements for legal sufficiency, and not just fail for reasons unrelated to a determination of the insufficiency of proof of the factual elements of the offense.

DECISIONS FROM OTHER JURISDICTIONS

Although the state courts of Texas have been by far the most prevalent in ordering acquittals because of a failure to corroborate accomplice testimony, such decisions are not limited to that jurisdiction. Several courts of other states have ruled similarly. In addition, two federal circuit courts of appeals have held that insufficiency of the evidence due to a failure to corroborate accomplice testimony constitutes a double jeopardy bar to reprosecution.[3] A compilation of cases in which the courts have so ruled is attached hereto. App. 66, 67.

[3] In one of the federal cases, *DuBois v. Lockhart*, 859 F.2d 1314 (8th Cir. 1988), the court did consider the effect of this Court's decision in *Tibbs* upon the disposition of the case. However, in response to the State's contention that the

CONCLUSION

An acquittal of a charge where the conviction is determined to be supported by insufficient evidence, due solely to the failure to sufficiently corroborate accomplice testimony, is not a proper application of the federal double jeopardy principles first pronounced in *Burks* and *Greene*. Instead of the evidence in this case failing to meet the minimal due process requirements of *Jackson v. Virginia*, it is more akin to the evidence determined to be lacking in sufficient *weight* in *Tibbs v. Florida*. In order to meet the requirements of *Jackson v. Virginia*, it would only be necessary that any rational juror find the elements of the offense to have been proven beyond a reasonable doubt, without regard to any corroboration of an accomplice witness. However, Vernon's Ann.C.C.P. art. 38.14 constitutes an additional state-created standard that governs the *weight* of the evidence sufficient to convict. Thus,

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requirement that accomplice testimony be corroborated was not an element of the offense, the Court of Appeals reasoned that the question was not whether corroborated accomplice testimony was an element of the crime but whether it affected the proof required for the conviction. And, according to the court, under Arkansas law, such compliance was necessary for the conviction. *Id.* at 1317-18. However, the same could have been said of the Florida rule at issue in *Tibbs*. Although not considered to be an element of the offense, the sufficiency of the evidence pursuant to the Florida statute was just as necessary to the conviction of *Tibbs* as was the Arkansas statute requiring corroborated accomplice testimony in *DuBois*. The relevant distinction that should have been employed by the Court of Appeals in *DuBois* is that compliance with the Arkansas statute requiring corroborated accomplice testimony was not necessary to meet the legal sufficiency standard of *Burks* and *Greene*, in the same manner that compliance with the Florida statute governing the weight of the evidence was not necessary in *Tibbs*.

the situation in this case would not be determined by the principle referred to by the Supreme Court in *Burks* that an acquittal, no matter how erroneous, would be afforded absolute finality. As such, the appellate court's determination of evidentiary insufficiency in this case would be the same as an appellate court's determination of insufficient weight of the evidence to support the conviction, pursuant to the Court's decision in *Tibbs v. Florida*. In neither case should the reviewing court's determination that the evidence is insufficient to support the jury's verdict constitute a double jeopardy bar to reprosecution.

PRAYER

Petitioner respectfully requests that this Court grant the petition for writ of certiorari.

Respectfully submitted,

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Fourth Court of Appeals District of Texas
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* * * (Logo) * * *

OPINION
Appeal No. 04-96-00185-CR

Bruce **FERNANDEZ,**
Appellant

v.

The **STATE** of Texas,
Appellee

From the 227th Judicial District Court,
Bexar County, Texas
Trial Court No. 95-CR-0391
Honorable Mike Machado, Judge Presiding

Opinion by: John F. Onion, Jr., Justice

Sitting: Phil Hardberger, Chief Justice
Catherine Stone, Justice
John F. Onion, Jr., Justice[1]

Delivered and Filed: January 21, 1998

REVERSED AND ACQUITTAL ORDERED

This appeal stems from convictions on two counts of aggravated robbery alleged in a single indictment. After the jury found appellant Bruce Fernandez guilty, punishment was assessed at 20 years' imprisonment on each count. The sentences were ordered to run concurrently.

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[1] Assigned to this case by the Chief Justice of the Supreme Court of Texas.

Appellant advances eight points of error. Initially, appellant contends that the trial court erred in denying his motion for an instructed verdict of not guilty because the State failed to corroborate the testimony of the accomplice witness as required by law. *See* TEX. CODE CRIM. PROC. 38.14 (Vernon 1979). Such contentions are now considered as challenges to the sufficiency of the evidence to sustain the conviction. *See Cook v. State*, 858 S.W.2d 467, 469-70 (Tex. Crim. App. 1993).

Under the appellate record before this court, we conclude that the first point of error must be sustained. We need not enumerate the other points of error.

Facts

Rudy Ybarra was the State's first witness. He had pleaded guilty to robbery, and the trial court was to later instruct the jury that Ybarra was an accomplice witness as a matter of law.

Ybarra and appellant were together on the afternoon of October 20, 1994. About 9:30 p.m., Jerry Lopez and Carlos Garibay came by appellant's house and the foursome left in Lopez's blue Dodge Dynasty automobile and drove out on U.S. 281. According to Ybarra, appellant and Garibay began talking about "jacking" or robbing someone. The group began to follow a pickup truck whose tire rims attracted their attention. Garibay handed a gun to appellant. The truck was followed into a neighborhood near Marbach Street. The individuals in the truck got inside their house before appellant and his companions arrived.

The group then drove down Broadway into Alamo Heights where two Cadillac automobiles were spotted driving ahead of the Dodge. Appellant stated that he wanted to rob the owners of one of the Cadillacs. Lopez followed one of the Cadillacs up the Austin Highway and then onto Sheraton Street where the Cadillac turned into a driveway. Ybarra revealed that appellant got out of the Dodge and sneaked up to the Cadillac and waited for the occupants to get out. Appellant was wearing dark clothing and had a cap on his head and a bandana around his face. Ybarra saw appellant pointing the gun at a man and a woman as they were exiting their vehicle.

Ybarra explained that he and the others decided to leave appellant when they saw a police car pull onto Sheraton Street. When they stopped at a stop sign, appellant jumped into the car with the gun and a purse. As he did, the gun discharged, and Lopez was hit in the neck. Appellant jumped out of the Dodge and said "Y'all don't know me." At this time, the gun in appellant's hand discharged again, and appellant ran off.

After appellant fled, the wounded Lopez managed to pull onto the Austin Highway, and Garibay grabbed the wheel of the Dodge and brought it to a stop. A nearby San Antonio Police officer was flagged down and assistance was requested for Lopez who was bleeding from the neck and coughing up blood. EMS arrived to care for Lopez. By this time, the Terrell Hills Police arrived and informed the other officers that the three men had been involved in a robbery. Ybarra and Garibay were then arrested. Lopez did not survive.

Diana Morehouse testified that on the night of October 20, 1994, she and her husband were returning home from a charity event in their 1993 Cadillac. As they pulled into the garage at their home and exited their car, a man, waving a gun, ran into the driveway and yelled: "Give me your money, you m___ f___." She gave the assailant her purse which was later recovered from Lopez's car.

Mrs. Morehouse was unable to see the assailant's face as he was wearing a dark knitted cap and something around his face. She noticed that he had a slender build, was about five feet, seven or eight inches tall and had olive colored skin. The man ran and the witness then heard what she thought were shots. She did not see the car as she was terrified and trying to get into her home. Mrs. Morehouse did not know appellant and could not identify him as the robber though appellant was approximately the same size and build.

Jeffrey Morehouse basically reiterated the events revealed by his wife. He described the armed robber as being masked and being a little taller than he was. The man seemed to have a Hispanic accent. Morehouse gave the robber a gold money clip with three or four hundred dollars and saw his wife give the man her purse. He described the getaway car as being a blue or gray four door vehicle. Morehouse also described how the robber got in the back passenger seat of the vehicle containing three other people but he couldn't estimate their size. Morehouse heard two shots fired. He immediately went inside his home and called 911. Morehouse was taken by the police to the location where the Dodge had come to a stop. Morehouse was unable to identify Lopez, Ybarra, or Garibay as the robber. Morehouse and Officer Bennett

then searched the area near Sheraton Morningside, and Austin Highway where Morehouse heard shots being fired. They found a nine millimeter semi-automatic handgun.

At trial, Morehouse testified that he did not know appellant and could not identify him as the robber. When asked if appellant was the same size and build, he answered: "I would say he's along the same. I would assume he's a few inches taller than I am and about the right build. But as to whether – that's about all I could say."

Terrell Hills Police Sergeant Andres DeLeon testified that about 11:40 p.m. on the night in question he was in a parking lot on Austin Highway sitting in his police vehicle when he saw a Cadillac being followed by a blue four door Dodge with its headlights off. In a few minutes he followed the cars. As he approached Sheraton and Morningside, he saw a slim built young man about five feet, seven or eight inches tall, running from the Morehouse house. While searching for this individual he received a dispatch about the robbery and went to the Morehouse house. On his way he saw the blue Dodge but continued to the house as directed. While talking to Morehouse, DeLeon received a dispatch about the Dodge being stopped on Austin Highway. DeLeon went to that location and saw the three suspects. He described Garibay as being five feet, ten or eleven inches tall, stout, weighing between 200 and 220 pounds with collar-length hair. Ybarra was described as weighing between 280 and 300 pounds. Lopez was described as being five feet, ten or

eleven inches tall and weighing 180 to 190 pounds. Sergeant DeLeon identified a bandana as having been recovered from the back pocket of Garibay's pants.

Terrell Hills Police Detective Donald Davis recovered a 9 millimeter shell case from the Dodge and took charge of the handgun found by Officer Bennett and Morehouse. He revealed that the weapon was jammed when found. No attempt was made to lift fingerprints from the weapon.

Richard Stengel, a firearms examiner, testified that the bullet recovered from Lopez's body, and the spent shell casing found in the car, were fired from the gun that was recovered.

Detective Davis took a written statement from appellant which was introduced before the jury. In the statement, appellant admitted that he and Ybarra were walking to Ybarra's home about 8:00 p.m. on October 20, 1997, when they were picked up by Lopez and Garibay driving a blue Dodge. They went to a convenience store because Ybarra was hungry. On the way, Garibay gave appellant a 9 millimeter pistol and said he wanted to sell it. After examining the weapon, appellant returned it to Garibay as he did not know anyone interested in purchasing a gun. After leaving the convenience store, appellant claimed he was taken home, that he talked to his sister, and then went to bed. He did not awaken until 10 or 11 o'clock the next morning.

Sufficiency of the Corroboration

Appellant, in his first point of error, contends that the evidence is insufficient to corroborate the testimony of the accomplice witness as required by article 38.14 and that his convictions cannot stand.

The standard for reviewing the legal sufficiency of the evidence is whether, viewing the evidence in the light most favorable to the jury's verdict, any rational trier of fact could have found beyond a reasonable doubt the essential elements of the offense charged. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *Villalon v. State*, 791 S.W.2d 130, 132 (Tex. Crim. App. 1990); *Skillern v. State*, 890 S.W.2d 849, 879 (Tex. App. – Austin 1994, pet. ref'd). The standard of review is the same in both direct and circumstantial evidence cases. *Herndon v. State*, 787 S.W.2d 408, 409 (Tex. Crim. App. 1990). In our review of the legal sufficiency of the evidence, we must consider all the evidence that the jury was permitted, properly or improperly, to consider. *Johnson v. State*, 871 S.W.2d 183, 186 (Tex. Crim. App. 1993), *cert. denied*, 511 U.S. 1046 (1994). Moreover, the sufficiency of the evidence should be measured by the elements of the offense as defined by the "hypothetically correct jury charge for the case." *Malik v. State*, 953 S.W.2d 234, 240 (Tex. Crim. App. 1997).

Appellant, however, claims the evidence never measured up to the requirement of article 38.14 which provides:

> A conviction cannot be had upon the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant

> with the offense committed; and the corroboration is not sufficient if it merely shows the commission of the offense.

TEX. CODE CRIM. PROC. ANN. art. 38.14 (Vernon 1979).

It is clear from the statute that the testimony of an accomplice witness alone cannot furnish the basis for a conviction and a conviction so based must be reversed. *Paulus v. State*, 633 S.W.2d 827, 843 (Tex. Crim. App. 1981). And this is true no matter how complete a case against the defendant may have been made by the accomplice witness's testimony, and no matter how much credit the jury might have given to such testimony. *Id; Walker v. State*, 615 S.W.2d 728, 731 (Tex. Crim. App. 1981).

An accomplice witness has been described as a discredited witness. *See Munoz v. State*, 853 S.W.2d 558, 559 (Tex. Crim. App. 1993). It has been said that the testimony of an accomplice witness must be viewed with caution and carefully scrutinized not only because of any interest such witness might have, but because his or her testimony is evidence from a corrupt source. *Paulus*, 633 S.W.2d at 843.

The purpose of the accomplice witness rule is to ensure that the jury does not consider accomplice witness evidence unless the jury finds both that the accomplice witness is telling the truth and that other evidence corroborates the accomplice witness. *See Tran v. State*, 870 S.W.2d 654, 658 (Tex. App. – Houston [1st Dist.] 1994, pet. ref'd). The accomplice witness rule is a legislative creation, not required by common law or as a matter of federal constitutional law. *Thompson v. State*, 691 S.W.2d

627, 631 (Tex. Crim. App. 1984), *cert. denied*, 474 U.S. 865 (1985).

In *Edwards v. State*, 427 S.W.2d 629, 632 (Tex. Crim. App. 1968), the court wrote:

> The test as to the sufficiency of the corroboration is to eliminate from consideration the evidence of the accomplice witness and then to examine the other witnesses with the view to ascertain if there be inculpatory evidence, that is evidence of incriminating character which tends to connect the defendant with the commission of the offense. If there is such evidence, the corroboration is sufficient; otherwise it is not.

See also Burks v. State, 876 S.W.2d 877, 887 (Tex. Crim. App. 1994), *cert. denied*, 513 U.S. 1114 (1995); *Munoz*, 853 S.W.2d at 559; *Reed v. State*, 744 S.W.2d 112, 125 (Tex. Crim. App. 1988); *McDuff v. State*, 943 S.W.2d 517, 521 (Tex. App. – Austin 1997, pet. ref'd).

In applying the test of the sufficiency of the corroboration each case must be considered on its own facts and circumstances, *Reed*, 744 S.W.2d at 126, and all facts may be looked to as furnishing the corroboration. *Washburn v. State*, 318 S.W.2d 627, 634 (Tex. Crim. App. 1958), *cert. denied*, 359 U.S. 965 (1959). The corroborative evidence may be circumstantial or direct. *Gosch v. State*, 829 S.W. 2d 775, 777 (Tex. Crim. App. 1991), *cert. denied*, 509 U.S. 922 (1993); *Paulus*, 633 S.W.2d at 843. Corroborative evidence need not establish the defendant's guilt of the charged offense nor directly link the accused to the offense, but is sufficient if it "tends" to connect the defendant to the offense. *Cox v. State*, 830 S.W.2d 609, 611 (Tex. Crim. App. 1992); *Granger v. State*, 683 S.W.2d 387, 392 (Tex. Crim.

App. 1984), *cert. denied*, 472 U.S. 1012 (1985). Insignificant circumstances sometimes afford most satisfactory evidence of guilt and corroboration of the accomplice witness testimony. *Reed*, 744 S.W.2d at 126.

When, however, the non-accomplice witness' evidence does no more than point the finger of suspicion towards an accused it is insufficient to corroborate as required by article 38.14. *Paulus*, 633 S.W.2d at 844. Although an accomplice witness may state any number of facts that are corroborated by evidence of non-accomplice witnesses, still if the facts thus corroborated do not tend to connect the accused with the crime, corroboration on that basis would not meet the requirements of article 38.14. *Id.* If the non-accomplice witness evidence fails to connect the accused to the offense, the evidence is insufficient to support the conviction. *Munoz*, 853 S.W.2d at 560.

Ybarra, the accomplice witness as a matter of law, made out a complete case against appellant. Without the requirements of article. 36.14, [sic] there would be no question as to the sufficiency of the evidence to support the convictions. Applying the legislatively created accomplice witness rule as we are required to do, and the test of sufficiency of corroboration as discussed in *Edwards*, we must look to the non-accomplice witnesses' testimony. The critical question is whether that evidence tends to connect appellant to the commission of the crimes charged.

The State introduced appellant's extrajudicial statement. Such a statement, if it tends to connect the accused to the commission of the offense, may in a proper case itself corroborate the accomplice witness's testimony. *See*

DeBlanc v. State, 799 S.W.2d 701, 718 (Tex. Crim. App. 1990). Appellant's statement only admitted that he had been with the other three suspects earlier in the evening, and had examined and returned a gun to Garibay. The statement alone does not tend to connect appellant with the offenses. The Morehouses were unable to identify the robber nor was Officer DeLeon able to identify the individual seen running from the Morehouse residence. They gave a vague description as to possible height and body size. Only DeLeon described the individual as a young man. While there was evidence that appellant fit the general description, so would hundreds or thousands of other men in the area. No fingerprints were lifted from the weapon found and no other non-accomplice evidence placed appellant at the scene or in the company of the other three suspects at the time. Of course, a number of the facts stated by Ybarra were corroborated, still these corroborated facts do not tend to connect appellant with the crimes, and corroboration on that basis does not meet the requirements of article 36.14.

Conclusion

We conclude that the accomplice witness's testimony has not been corroborated as required by law. The first point of error is sustained. We, therefore, do not reach the other points of error.

The judgments of conviction are reversed and appellant is ordered acquitted of each. *See Burks v. United*

States, 437 U.S. 1 (1978); *Greene v. Massey*, 437 U.S. 19 (1978).

JOHN F. ONION, JR.
JUSTICE

DO NOT PUBLISH

Court of Appeals
Fourth Court of Appeals District of Texas
San Antonio
* * * (Logo) * * *

JUDGMENT
Appeal No. 04-96-00185-CR

Bruce **FERNANDEZ**,
Appellant

v.

The **STATE** of Texas,
Appellee

From the 227th Judicial District Court,
Bexar County, Texas
Trial Court No. 95-CR-0391
Honorable Mike Machado, Judge Presiding

BEFORE CHIEF JUSTICE HARDBERGER, JUSTICE STONE, AND JUSTICE ONION

In accordance with this Court's opinion of this date, the judgments of conviction are REVERSED and appellant is ORDERED ACQUITTED of each.

SIGNED January 21, 1998.

/s/ Phil Hardberger
PHIL HARDBERGER
CHIEF JUSTICE

NO. 04-96-00185-CR

IN THE COURT OF APPEALS

FOR THE FOURTH DISTRICT OF TEXAS

BRUCE FERNANDEZ, Appellant

V

THE STATE OF TEXAS, Appellee

Appeal from BEXAR County

STATE'S MOTION FOR REHEARING

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NO. 04-96-00185-CR

IN THE COURT OF APPEALS

FOR THE FOURTH DISTRICT OF TEXAS

BRUCE FERNANDEZ, Appellant

V.

THE STATE OF TEXAS, Appellee

STATE'S MOTION FOR REHEARING

TO THE HONORABLE COURT OF APPEALS:

Comes now the State of Texas, by and through its State Prosecuting Attorney, and respectfully presents to this Court its motion for rehearing in the above named cause, and as ground therefor, would show the Court the following:

STATEMENT OF THE CASE

The appellant, Bruce Fernandez, was charged in two counts of aggravated robbery. A jury found the appellant guilty and his punishment was assessed at 20 years' imprisonment on each count. On original submission, this Court sustained the appellant's first point of error, in which he alleged that the trial court erred in denying his motion for an instructed verdict of not guilty because the State failed to corroborate the testimony of an accomplice witness. Pursuant to the mandate of *Burks v. United States*, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978), and *Greene v. Massey*, 437 U.S. 19, 98 S.Ct. 2151, 57 L.Ed.2d 15 (1978), the Court ordered an acquittal to be entered for each count.

ARGUMENT AND AUTHORITIES

In this case, we do not contest the Court's determination that the evidence is insufficient to corroborate the

accomplice testimony. Nor do we disagree that the judgments of conviction must be reversed. Instead, our disagreement is with the Court's conclusion that insufficiency of the evidence, solely because of a failure to corroborate accomplice testimony, requires entry of an acquittal, thereby creating a double jeopardy bar to reprosecution. Moreover, we recognize that, even if this Court were to agree with our ultimate conclusion regarding the appropriate remedy, the Court may still feel that it is bound to follow contrary precedent from the Court of Criminal Appeals.

I.

Certainly, everyone agrees that when the evidence is deemed legally insufficient to sustain the conviction, a retrial would violate the double jeopardy principles articulated by the United States Supreme Court in *Burks* and *Greene*. However, what has not been expressly articulated is the standard to be employed to determine when the State's evidence is so deficient that a retrial would be barred. Is the standard the minimal due process standard of *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)? Or, is it enough that the State's evidence failed to comply with a *state law* that governs the authority to convict? Or, instead, is the standard at some point in between?

While we are not aware of any definitive holding by the Supreme Court on this issue, we believe that the appropriate standard is the minimal due process requirement of *Jackson v. Virginia*. If that conclusion is correct,

then the State's evidence in this case is not legally insufficient according to federal law, such that double jeopardy implications would be triggered, because a corroboration requirement of accomplice testimony, such as that contained in Vernon's Ann.C.C.P. art. 38.14, is not required by the United States Constitution in order to meet the minimal due process requirements. *See Caminetti v. United States*, 242 U.S. 470, 37 S.Ct. 192, 61 L.Ed. 442 (1917).

II.

In *Jackson v. Virginia*, supra, the Supreme Court held that the evidence would be considered sufficient to meet due process requirements if any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. And, in both *Burks* and *Greene*, it is clear that the Supreme Court was considering situations in which the State's evidence failed to comply with that standard. What is not clear from *Burks* and *Greene* is whether the court was limiting its holding to such inadequacies in the prosecution's evidence, or whether that just happened to be the situations presented in those cases. Any answer to that issue would have to wait until another day.

That day came when the Supreme Court decided the case of *Tibbs v. Florida*, 457 U.S. 31, 102 S.Ct. 2211, 72 L.Ed.2d 652 (1982). At the time, a Florida appellate rule authorized an appellate court to review the evidence in a death sentence case to determine if the interests of justice required a new trial, whether the insufficiency of the evidence was a ground of appeal or not. Pursuant to that rule, the Florida Supreme Court had determined in *Tibbs*

that, although the evidence was legally sufficient to meet the requirements of *Jackson v. Virginia*, weaknesses in the prosecution's evidence required a new trial in the interests of justice. The United States Supreme Court ruled that when an appellate court so concludes that a guilty verdict is against the *weight* of the evidence, as opposed to being legally *insufficient*, the Double Jeopardy Clause does not bar the prosecution from a retrial.

Although the Supreme Court again, as in *Burks* and *Greene*, was not explicit regarding the applicable standard of evidentiary insufficiency necessary to invoke a double jeopardy bar to retrial, the implications from the court's language support the conclusion that it is the *Jackson v. Virginia* legal insufficiency standard that is to apply. First of all, the Supreme Court stated in the following language the holding of the Florida Supreme Court that it was to review, and ultimately affirm:

> Having found that it could not "fairly conclude . . . that Tibbs' convictions were reversed on the grounds of evidentiary insufficiency," *id.*, at 1127, the Florida Supreme Court held that *Greene* and *Burks* do not bar retrial. Those decisions, the court believed, as well as *United States v. DiFrancesco*, 449 U.S. 117, 101 S.Ct. 426, 66 L.Ed.2d 328 (1980), interpret the Double Jeopardy Clause to preclude retrial after reversal of a conviction only when the appellate court has set the conviction aside on the ground that the evidence was legally insufficient to support conviction. Other reversals, including those based on the weight of the evidence or made in the "interests of justice," do not implicate double jeopardy principles.

Tibbs v. Florida, 457 U.S. at 39, 102 S.Ct. at 2216, 72 L.Ed.2d at 659.

Also, the Supreme Court described its previous holdings in *Burks* and *Greene* in the following manner:

> *Burks v. United States* and *Greene v. Massey* carved a narrow exception from the understanding that a defendant who successfully appeals a conviction is subject to retrial. In those cases, we held that the Double Jeopardy Clause precludes retrial "once the reviewing court has found the evidence legally insufficient" to support conviction. This standard, we explained, "means that the government's case was so lacking that it should not have even been *submitted* to the jury." *Burks*, 437 U.S., at 16, 98 S.Ct., at 2149 (emphasis in original). A conviction will survive review, we suggested, whenever "the evidence and inferences therefrom most favorable to the prosecution would warrant the jury's finding the defendant guilty beyond a reasonable doubt. In sum, we noted that the rule barring retrial would be "confined to cases where the prosecution's failure is clear." *Burks, supra*, at 17, 98 S.Ct., at 2150.

Tibbs v. Florida, 457 U.S. at 40-41, 102 S.Ct. at 2217, 72 L.Ed.2d at 660-61. (Citations omitted).

Moreover, the Supreme Court in *Tibbs* made specific reference to the Due Process Clause's standard of evidentiary sufficiency decided in *Jackson v. Virginia*. This reference was made in response to the petitioner's contention that a distinction between the weight and the sufficiency of the evidence would undermine the *Burks* rule by encouraging appellate judges to base reversals on the

weight, rather than the sufficiency, of the evidence. The context in which this reference was made is also an indication that the Supreme Court was making a distinction, for purposes of double jeopardy, between cases determined to be deficient due to evidentiary weight or due to legal insufficiency, and that it considered the *Jackson v. Virginia* threshold as the mark for any triggering of double jeopardy limitations on reprosecution. *Tibbs v. Florida*, 457 U.S. at 44-45, 102 S.Ct. at 2219-20, 72 L.Ed.2d at 663.

This distinction drawn by the Supreme Court is further evidenced by the court's explanation of the difference between reversals of convictions due to evidentiary insufficiency and reversals because a guilty verdict is against the weight of the evidence. The court explained:

> As we suggested just last Term, these policies do not have the same force when a judge disagrees with a jury's resolution of conflicting evidence and concludes that a guilty verdict is against the weight of the evidence. See *Hudson v. Louisiana*, 450 U.S. 40, 44-45, n. 5, 101 S.Ct. 970, 972-973, n. 5, 67 L.Ed.2d 30 (1981). A reversal on this ground, unlike a reversal based on insufficient evidence, does not mean that acquittal was the only proper verdict. Instead, the appellate court sits as a "thirteenth juror" and disagrees with the jury's resolution of the conflicting testimony. This difference of opinion no more signifies acquittal than does a disagreement among the jurors themselves. A deadlocked jury, we consistently have recognized, does not result in an acquittal barring retrial under the Double Jeopardy Clause. Similarly, an appellate court's disagreement with the jurors'

> weighing of the evidence does not require the special deference accorded verdicts of acquittal.

Id., 457 U.S. at 42, 102 S.Ct. at 2218, 72 L.Ed.2d at 661-62. Clearly, the Supreme Court did not view an appellate finding that the verdict was against the weight of the evidence as possessing those same distinguishing properties as would a verdict of acquittal.

Finally, any ambiguity regarding the appropriate standard of evidentiary insufficiency that might persist from the majority opinion in *Tibbs* is allayed by Justice White's dissenting opinion in the case. Justice White believed the "trump card" in this analysis to be the court's assertion in *Burks* that the Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding. According to Justice White, since either situation, whether it involved evidence deemed legally insufficient under the federal due process standard or evidence determined to be inadequate on state law grounds, involved the failure of the State to present evidence adequate to sustain the conviction, the double jeopardy implications of each situation should be the same. Obviously, the majority of the court rejected this interpretation. However, more important to the issue in this case is Justice White's assertion of what the court's majority was holding. To illustrate this point, we quote at length from portions of the dissenting opinion:

> The majority concedes, as it must under *Burks, supra,* that if the State's evidence failed to meet the federal due process standard of evidentiary sufficiency, the Double Jeopardy

> Clause would bar reprosecution. The majority fails to explain why the State should be allowed another try where its proof has been held inadequate on state-law grounds, when it could not do so were it inadequate on federal law grounds.
>
> * * *
>
> The majority offers two arguments in its attempt to distinguish the two cases. First, it emphasizes that the Double Jeopardy Clause "attaches special weight to judgments of acquittal." . . . Second, the majority thinks it to be of some significance that when the evidence is determined to be insufficient as a matter of federal law, then no rational factfinder could have voted to convict on that basis. On the other hand, when the conviction is reversed on the basis of the state-law rule applying a "weight of the evidence" test, that "does not mean that acquittal was the only proper verdict." *Ante,* at 2218. The constraints of the Double Jeopardy Clause, however, do not depend upon a determination that an "acquittal was the only proper verdict." The fact remains that the State failed to prove the defendant guilty in accordance with the evidentiary requirements of state law.
>
> * * *
>
> . . . That the proof fails on state-law, rather than federal-law grounds is immaterial to these policy considerations.

Tibbs v. Florida, 457 U.S. at 48-50, 102 S.Ct. at 2222-23, 72 L.Ed.2d at 665-67 (White, J., dissenting).

Justice White certainly understood the majority of the Supreme Court in *Tibbs* to be making the relevant distinction between cases determined to be inadequate on federal-law grounds, i.e., legal insufficiency of the evidence, and those held inadequate on state-law grounds.

III.

Additional support for the proposition that double jeopardy implications arising from an insufficiency of the evidence are to be governed by the federal due process standard of *Jackson v. Virginia* can be found in the language utilized by the Supreme Court in *United States v. Scott*, 437 U.S. 82, 98 S.Ct. 2187, 57 L.Ed.2d 65 (1978), which was handed down the same day as were *Burks* and *Greene*. In *Scott*, the Supreme Court was interpreting a federal statute which prohibited appeals by the government of the dismissal of an indictment if the Double Jeopardy Clause prohibited further prosecution. There, the Supreme Court said:

> . . . Despite respondent's contentions, an appeal is not barred[1] simply because a ruling in favor of a defendant "is based upon facts outside the face of the indictment," *id.*, at 348, 95 S.Ct., at 1024, or because it "is granted on the ground . . . that the defendant simply cannot be convicted of the offense charged," *Lee*, 432 U.S., at 30, 97 S.Ct., at 2146. Rather, a defendant is acquitted only when "the ruling of the judge, whatever its label, actually represents a resolution [in the defendant's favor], correctly or not,

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[1] In other words, there is no double jeopardy bar to reprosecution.

> of some or all of the factual elements of the offense charged," *Martin Linen, supra,* 430 U.S., at 571, 97 S.Ct., at 1355. Where the court, before the jury returns a verdict, enters a judgment of acquittal pursuant to Fed.Rule Crim.Proc. 29, appeal will be barred only when "it is plain that the District Court . . . evaluated the Government's evidence and determined that it was legally insufficient to sustain a conviction." 430 U.S., at 572, 97 S.Ct., at 1355.

Id., 437 U.S. at 96-97, 98 S.Ct. at 2197, 57 L.Ed.2d at 78.

And, in footnote 11 of *Scott,* the court made the following observation: "While an acquittal on the merits by the trier of fact 'can never represent a determination that the criminal defendant is innocent in any absolute sense,' *post,* at 2202 (BRENNAN, J., dissenting), a defendant who has been released by a court for reasons required by the Constitution or laws, but which are unrelated to factual guilt or innocence, has not been determined to be innocent in any sense of that word, absolute or otherwise. In other circumstances, this Court has had no difficulty in distinguishing between those rulings which relate to "the ultimate question of guilt or innocence" and those which serve other purposes." *Id.*, 437 U.S. at 98, n. 11, 98 S.Ct. at 2197-98, n. 11, 57 L. Ed. 2d at 79, n. 11.

The above-cited language from *United States v. Scott* represents a further indication that the United States Supreme Court believes that to invoke a double jeopardy bar to reprosecution, the prosecution's evidence must fail to meet the requirements for legal sufficiency, and not

just fail for reasons unrelated to a determination of insufficiency of proof of the factual elements of the offense.

IV.

The Court of Criminal Appeals recently retreated from its utilization of the *"Benson-Boozer"* doctrine as a supposed implementation of federal double jeopardy principles. In *Malik v. State*, 953 S.W.2d 234 (Tex.Cr.App. 1997), the court finally recognized that the *"Benson-Boozer"* line of cases constituted an aberrational application of federal double jeopardy jurisprudence to a unique state-law construct for determining evidentiary sufficiency. In *Malik*, the Court of Criminal Appeals held that, instead of measuring the sufficiency of the evidence against the jury charge actually given, sufficiency of the evidence should be measured by the elements of the offense as defined by the hypothetically correct jury charge for the case. Such a charge would be one that accurately sets out the law, is authorized by the indictment, does not necessarily restrict the State's theories of liability, and adequately describes the particular offense for which the defendant was tried.

To the extent that the *Malik* decision constituted an attempt by the Court of Criminal Appeals to bring its application of federal principles of double jeopardy more in line with that applied by the federal system, the decision is a significant improvement. However, by looking to a hypothetically correct charge to gauge the sufficiency of the evidence, the Court of Criminal Appeals failed to go far enough to properly implement these federal constitutional principles. For example, in this case, in which

corroboration of accomplice testimony does not fulfill any requirement of federal due process, it being instead a state-created rule governing the *weight of the evidence* sufficient to convict, such corroboration requirement would nevertheless have to be considered part of a hypothetically correct jury charge for the case.[2]

V.

Yet, an acquittal of a conviction determined to be supported by insufficient evidence, due solely to the failure to sufficiently corroborate accomplice testimony, is not a proper application of the federal double jeopardy principles first pronounced in *Burks* and *Greene*. Instead of the evidence in this case failing to meet the minimal due process requirements of *Jackson v. Virginia*, it is more akin to the evidence determined to be lacking in sufficient *weight* in *Tibbs v. Florida*. In order to meet the requirements of *Jackson v. Virginia*, it would only be necessary that any rational juror find the elements of the offense to have been proven beyond a reasonable doubt, without regard to any corroboration of an accomplice witness. However, Vernon's Ann.C.C.P. art. 38.14 constitutes an additional state-created standard that governs the *weight* of the evidence sufficient to convict.

It is also significant that Art. 38.14 does not speak in terms of an "acquittal." Instead, it reads "[a] conviction cannot be had. . . . " Therefore, the reversal on appeal

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[2] Therefore, we understand how this Court may believe itself bound to acquit the appellant because of the decision by the Court of Criminal Appeals in *Malik*.

cannot be considered as an implied acquittal of the offense. Thus, the situation in this case would not be determined by the principle referred to by the Supreme Court in *Burks* that an acquittal, no matter how erroneous, would be afforded absolute finality. As such, the appellate court's determination of evidentiary insufficiency in this case would be the same as an appellate court's determination of factual insufficiency, pursuant to *Clewis v. State*, 922 S.W.2d 126 (Tex.Cr.App. 1996).[3] In neither case does the reviewing court's determination that the evidence is insufficient to support the jury's verdict constitute a double jeopardy bar to reprosecution.

PRAYER FOR RELIEF

WHEREFORE, the State of Texas prays that the Court grant this motion for rehearing and remand the cause for a new trial.

Respectfully submitted,

MATTHEW PAUL
State Prosecuting Attorney
Bar I.D. No. 15641050

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[3] In *Clewis*, the Court of Criminal Appeals described the double jeopardy consequences of an appellate reversal due to evidentiary insufficiency in the following manner: "[R]etrial is prohibited where the reviewing court determines that the evidence is insufficient under *Jackson*. That is, as a practical matter, the State has only one opportunity to present evidence *legally* sufficient to convict a defendant." *Id.*, at 136. (Emphasis in original).

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 30th day of January, 1998, a true and correct copy of the foregoing State's Motion for Rehearing has been forwarded by U.S. Mail, postage prepaid to the following:

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Assistant Criminal District Attorney
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COURT OF APPEALS
FOURTH COURT OF APPEALS DISTRICT
300 DOLOROSA, SUITE 3200
BEXAR COUNTY CRIMINAL JUSTICE CENTER
SAN ANTONIO, TEXAS 78205-3037
HERB SCHAEFER, CLERK

February 18, 1998

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RE: Court of Appeals Number: 04-96-00185-CR

Trial Court Case Number: 95-CR-0391

Style: Bruce Fernandez
v.
The State of Texas

Dear Counsel:

After examining the record in the above styled and numbered cause, the Court DENIES State's Motion for Rehearing.

ORDERED the day and year above written.

Very truly yours,

HERB SCHAEFER, CLERK

/s/ Apryl Stirling

Apryl Stirling, Deputy Clerk

NO. 04-96-00185-CR

IN THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

BRUCE FERNANDEZ, Appellant

V.

THE STATE OF TEXAS, Appellee

Appeal from BEXAR County

* * * * *

STATE'S PETITION FOR DISCRETIONARY REVIEW

* * * * *

MATTHEW PAUL
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NO. 04-96-00185-CR

IN THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

BRUCE FERNANDEZ, Appellant

V.

THE STATE OF TEXAS Appellee

* * * * *

STATE'S PETITION FOR DISCRETIONARY REVIEW

* * * * *

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

Comes now the State of Texas, by and through its State Prosecuting Attorney, and respectfully urges this Court to grant discretionary review of the above named cause, pursuant to the rules of the Court.

STATEMENT REGARDING ORAL ARGUMENT

The State Prosecuting Attorney does request oral argument.

STATEMENT OF THE CASE

The appellant, Bruce Fernandez, was charged in two counts of aggravated robbery. A jury found the appellant

guilty and his punishment was assessed at 20 years' imprisonment on each count. On original submission, this Court sustained the appellant's first point of error, in which he alleged that the trial court erred in denying his motion for an instructed verdict of not guilty because the State failed to corroborate the testimony of an accomplice witness. Pursuant to the mandate of *Burks v. United States*, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978), and *Greene v. Massey*, 437 U.S. 19, 98 S.Ct. 2151, 57 L.Ed.2d 15 (1978), the Court ordered an acquittal to be entered for each count.

STATEMENT OF PROCEDURAL HISTORY

The appellant was convicted of two counts of aggravated robbery. On direct appeal, the San Antonio Court of Appeals concluded that the evidence was insufficient to sustain the convictions because the State had failed to sufficiently corroborate accomplice testimony. The Court of Appeals reversed the judgments of conviction and ordered entry of an acquittal as to each count.

The State filed a motion for rehearing, in which it contended that the proper remedy would have been for the Court of Appeals to remand the causes for new trials, instead of ordering the entry of acquittals. On February 18, 1998, the Court of Appeals overruled the State's motion for rehearing.

Thus, the State's petition for discretionary review is due to be filed on or before March 20, 1998.

GROUND FOR REVIEW

Where a conviction is reversed on appeal because of insufficient evidence, due solely to the failure to sufficiently corroborate accomplice testimony, is the proper remedy the entry of an acquittal or, instead, a remand for a new trial?

REASON FOR REVIEW

The Court of Appeals has decided an important question of federal law in a way that conflicts with an applicable decision of the Supreme Court of the United States, namely, *Tibbs v. Florida*, 457 U.S. 31, 102 S.Ct. 2211, 72 L.Ed.2d 652 (1982).

ARGUMENT AND AUTHORITIES

In this case, we do not contest the Court of Appeals's determination that the evidence is insufficient to corroborate the accomplice testimony. Nor do we disagree that the judgments of conviction must be reversed. Instead, our disagreement is with the intermediate court's conclusion that insufficiency of the evidence, solely because of a failure to corroborate accomplice testimony, requires entry of an acquittal, thereby creating a double jeopardy bar to reprosecution.

I.

Certainly, everyone agrees that when the evidence is deemed legally insufficient to sustain the conviction, a retrial would violate the double jeopardy principles articulated by the United States Supreme Court in *Burks* and

Greene. However, what has not been expressly articulated is the standard to be employed to determine when the State's evidence is so deficient that a retrial would be barred. Is the standard the minimal due process standard of *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)? Or, is it enough that the State's evidence failed to comply with a *state law* that governs the authority to convict? Or, instead, is the standard at some point in between?

While we are not aware of any definitive holding by the Supreme Court on this issue, we believe that the appropriate standard is the minimal due process requirement of *Jackson v. Virginia*. If that conclusion is correct, then the State's evidence in this case is not legally insufficient according to federal law, such that double jeopardy implications would be triggered, because a corroboration requirement of accomplice testimony, such as that contained in Vernon's Ann.C.C.P. art. 38.14, is not required by the United States Constitution in order to meet the minimal due process requirements. *See Caminetti v. United States*, 242 U.S. 470, 37 S.Ct. 192, 61 L.Ed. 442 (1917).

II.

In *Jackson v. Virginia*, supra, the Supreme Court held that the evidence would be considered sufficient to meet due process requirements if any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. And, in both *Burks* and *Greene*, it is clear that the Supreme Court was considering situations in which the State's evidence failed to comply with that standard. What is not clear from *Burks* and

Greene is whether the court was limiting its holding to such inadequacies in the prosecution's evidence, or whether that just happened to be the situations presented in those cases. Any answer to that issue would have to wait until another day.

That day came when the Supreme Court decided the case of *Tibbs v. Florida*, 457 U.S. 31, 102 S.Ct. 2211, 72 L.Ed.2d 652 (1982). At the time, a Florida appellate rule authorized an appellate court to review the evidence in a death sentence case to determine if the interests of justice required a new trial, whether the insufficiency of the evidence was a ground of appeal or not. Pursuant to that rule, the Florida Supreme Court had determined in *Tibbs* that, although the evidence was legally sufficient to meet the requirements of *Jackson v. Virginia*, weaknesses in the prosecution's evidence required a new trial in the interests of justice. The United States Supreme Court ruled that when an appellate court so concludes that a guilty verdict is against the *weight* of the evidence, as opposed to being legally *insufficient*, the Double Jeopardy Clause does not bar the prosecution from a retrial.

Although the Supreme Court again, as in *Burks* and *Greene*, was not explicit regarding the applicable standard of evidentiary insufficiency necessary to invoke a double jeopardy bar to retrial, the implications from the court's language support the conclusion that it is the *Jackson v. Virginia* legal insufficiency standard that is to apply. First of all, the Supreme Court stated in the following language the holding of the Florida Supreme Court that it was to review, and ultimately affirm:

> Having found that it could not "fairly conclude . . . that Tibbs' convictions were reversed on the grounds of evidentiary insufficiency," *id.*, at 1127, the Florida Supreme Court held that *Greene* and *Burks* do not bar retrial. Those decisions, the court believed, as well as *United States v. DiFrancesco*, 449 U.S. 117, 101 S.Ct. 426, 66 L.Ed.2d 328 (1980), interpret the Double Jeopardy Clause to preclude retrial after reversal of a conviction only when the appellate court has set the conviction aside on the ground that the evidence was legally insufficient to support conviction. Other reversals, including those based on the weight of the evidence or made in the "interests of justice," do not implicate double jeopardy principles.

Tibbs v. Florida, 457 U.S. at 39, 102 S.Ct. at 2216, 72 L.Ed.2d at 659.

Also, the Supreme Court described its previous holdings in *Burks* and *Greene* in the following manner:

> *Burks v. United States* and *Greene v. Massey* carved a narrow exception from the understanding that a defendant who successfully appeals a conviction is subject to retrial. In those cases, we held that the Double Jeopardy Clause precludes retrial "once the reviewing court has found the evidence legally insufficient" to support conviction. This standard, we explained, "means that the government's case was so lacking that it should not have even been *submitted* to the jury." Burks, 437 U.S., at 16, 98 S.Ct., at 2149 (emphasis in original). A conviction will survive review, we suggested, whenever "the evidence and inferences therefrom most favorable to the prosecution would warrant the jury's finding

> the defendant guilty beyond a reasonable doubt. In sum, we noted that the rule barring retrial would be "confined to cases where the prosecution's failure is clear." *Burks, supra,* at 17, 98 S.Ct., at 2150.

Tibbs v. Florida, 457 U.S. at 40-41, 102 S.Ct. at 2217, 72 L.Ed.2d at 660-61. (Citations omitted).

Moreover, the Supreme Court in *Tibbs* made specific reference to the Due Process Clause's standard of evidentiary sufficiency decided in *Jackson v. Virginia.* This reference was made in response to the petitioner's contention that a distinction between the weight and the sufficiency of the evidence would undermine the *Burks* rule by encouraging appellate judges to base reversals on the weight, rather than the sufficiency, of the evidence. The context in which this reference was made is also an indication that the Supreme Court was making a distinction, for purposes of double jeopardy, between cases determined to be deficient due to evidentiary weight or due to legal insufficiency, and that it considered the *Jackson v. Virginia* threshold as the mark for any triggering of double jeopardy limitations on reprosecution. *Tibbs v. Florida,* 457 U.S. at 44-45, 102 S.Ct. at 2219-20, 72 L.Ed.2d at 663.

This distinction drawn by the Supreme Court is further evidenced by the court's explanation of the difference between reversals of convictions due to evidentiary insufficiency and reversals because a guilty verdict is against the weight of the evidence. The court explained:

> As we suggested just last Term, these policies do not have the same force when a judge disagrees with a jury's resolution of conflicting

> evidence and concludes that a guilty verdict is against the weight of the evidence. See *Hudson v. Louisiana*, 450 U.S. 40, 44-45, n. 5, 101 S.Ct. 970, 972-973, n. 5, 67 L.Ed.2d 30 (1981). A reversal on this ground, unlike a reversal based on insufficient evidence, does not mean that acquittal was the only proper verdict. Instead, the appellate court sits as a "thirteenth juror" and disagrees with the jury's resolution of the conflicting testimony. This difference of opinion no more signifies acquittal than does a disagreement among the jurors themselves. A deadlocked jury, we consistently have recognized, does not result in an acquittal barring retrial under the Double Jeopardy Clause. Similarly, an appellate court's disagreement with the jurors' weighing of the evidence does not require the special deference accorded verdicts of acquittal.

Id., 457 U.S. at 42, 102 S.Ct. at 2218, 72 L.Ed.2d at 661-62. Clearly, the Supreme Court did not view an appellate finding that the verdict was against the weight of the evidence as possessing those same distinguishing properties as would a verdict of acquittal.

Finally, any ambiguity regarding the appropriate standard of evidentiary insufficiency that might persist from the majority opinion in *Tibbs* is allayed by Justice White's dissenting opinion in the case. Justice White believed the "trump card" in this analysis to be the court's assertion in *Burks* that the Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding. According to Justice White, since either situation, whether it involved evidence deemed legally insufficient under the

federal due process standard or evidence determined to be inadequate on state law grounds, involved the failure of the State to present evidence adequate to sustain the conviction, the double jeopardy implications of each situation should be the same. Obviously, the majority of the court rejected this interpretation. However, more important to the issue in this case is Justice White's assertion of what the court's majority was holding. To illustrate this point, we quote at length from portions of the dissenting opinion:

> The majority concedes, as it must under *Burks, supra,* that if the State's evidence failed to meet the federal due process standard of evidentiary sufficiency, the Double Jeopardy Clause would bar reprosecution. The majority fails to explain why the State should be allowed another try where its proof has been held inadequate on state-law grounds, when it could not do so were it inadequate on federal-law grounds.
>
> * * * * *
>
> The majority offers two arguments in its attempt to distinguish the two cases. First, it emphasizes that the Double Jeopardy Clause "attaches special weight to judgments of acquittal." . . . Second, the majority thinks it to be of some significance that when the evidence is determined to be insufficient as a matter of federal law, then no rational factfinder could have voted to convict on that basis. On the other hand, when the conviction is reversed on the basis of the state-law rule applying a "weight of the evidence" test, that "does not mean that acquittal was the only proper verdict." Ante, at 2218. The constraints of the Double Jeopardy

> Clause, however, do not depend upon a determination that an "acquittal was the only proper verdict." The fact remains that the State failed to prove the defendant guilty in accordance with the evidentiary requirements of state law.
>
> * * * * *
>
> . . . That the proof fails on state-law, rather than federal-law grounds is immaterial to these policy considerations.

Tibbs v. Florida, 457 U.S. at 48-50, 102 S.Ct. at 2222-23, 72 L.Ed.2d at 665-67 (White, J., dissenting).

Justice White certainly understood the majority of the Supreme Court in *Tibbs* to be making the relevant distinction between cases determined to be inadequate on federal-law grounds, i.e., legal insufficiency of the evidence, and those held inadequate on state-law grounds.

III.

Additional support for the proposition that double jeopardy implications arising from an insufficiency of the evidence are to be governed by the federal due process standard of *Jackson v. Virginia* can be found in the language utilized by the Supreme Court in *United States v. Scott*, 437 U.S. 82, 98 S.Ct. 2187, 57 L.Ed.2d 65 (1978), which was handed down the same day as were *Burks* and *Greene*. In *Scott*, the Supreme Court was interpreting a federal statute which prohibited appeals by the government of the dismissal of an indictment if the Double Jeopardy Clause prohibited further prosecution. There, the Supreme Court said:

> . . . Despite respondent's contentions, an appeal is not barred[1] simply because a ruling in favor of a defendant "is based upon facts outside the face of the indictment," *id.*, at 348, 95 S.Ct., at 1024, or because it "is granted on the ground . . . that the defendant simply cannot be convicted of the offense charged," *Lee*, 432 U.S., at 30, 97 S.Ct., at 2146. Rather, a defendant is acquitted only when "the ruling of the judge, whatever its label, actually represents a resolution [in the defendant's favor], correctly or not, of some or all of the factual elements of the offense charged," *Martin Linen, supra*, 430 U.S., at 571, 97 S.Ct., at 1355. Where the court, before the jury returns a verdict, enters a judgment of acquittal pursuant to Fed.Rule Crim.Proc. 29, appeal will be barred only when "it is plain that the District Court . . . evaluated the Government's evidence and determined that it was legally insufficient to sustain a conviction." 430 U.S., at 572, 97 S. Ct., at 1355.

United States v. Scott, 437 U.S. at 96-97, 98 S.Ct. at 2197, 57 L.Ed.2d at 78.

And, in footnote 11 of *Scott*, the court made the following observation: "While an acquittal on the merits by the trier of fact 'can never represent a determination that the criminal defendant is innocent in any absolute sense,' *post*, at 2202 (BRENNAN, J., dissenting), a defendant who has been released by a court for reasons

---

[1] In other words, there is no double jeopardy bar to reprosecution.

required by the Constitution or laws, but which are unrelated to factual guilt or innocence, has not been determined to be innocent in any sense of that word, absolute or otherwise. In other circumstances, this Court has had no difficulty in distinguishing between those rulings which relate to "the ultimate question of guilt or innocence" and those which serve other purposes." *Id.*, 437 U.S. at 98, n. 11, 98 S.Ct. at 2197-98, n. 11, 57 L.Ed.2d at 79, n. 11.

The above-cited language from *United States v. Scott* represents a further indication that the United States Supreme Court believes that to invoke a double jeopardy bar to reprosecution, the prosecution's evidence must fail to meet the requirements for legal sufficiency, and not just fail for reasons unrelated to a determination of insufficiency of proof of the factual elements of the offense.

IV.

This Court recently retreated from its utilization of the *"Benson-Boozer"* doctrine as a supposed implementation of federal double jeopardy principles. In *Malik v. State*, 953 S.W.2d 234 (Tex.Cr.App. 1997), the Court finally recognized that the *"Benson-Boozer"* line of cases constituted an aberrational application of federal double jeopardy jurisprudence to a unique state-law construct for determining evidentiary sufficiency. In *Malik*, the Court held that, instead of measuring the sufficiency of the evidence against the jury charge actually given, sufficiency of the evidence should be measured by the elements of the offense as defined by the hypothetically correct jury charge for the case. Such a charge would be one that

accurately sets out the law, is authorized by the indictment, does not necessarily restrict the State's theories of liability, and adequately describes the particular offense for which the defendant was tried.

To the extent that the *Malik* decision constituted an attempt by the Court to bring its application of federal principles of double jeopardy more in line with that applied by the federal system, the decision is a significant improvement. However, by looking to a hypothetically correct charge to gauge the sufficiency of the evidence, the Court failed to go far enough to properly implement these federal constitutional principles. For example, in this case, in which corroboration of accomplice testimony does not fulfill any requirement of federal due process, it being instead a state-created rule governing the *weight of the evidence* sufficient to convict, such corroboration requirement would nevertheless have to be considered part of a hypothetically correct jury charge for the case.

V.

Yet, an acquittal of a conviction determined to be supported by insufficient evidence, due solely to the failure to sufficiently corroborate accomplice testimony, is not a proper application of the federal double jeopardy principles first pronounced in *Burks* and *Greene*. Instead of the evidence in this case failing to meet the minimal due process requirements of *Jackson v. Virginia*, it is more akin to the evidence determined to be lacking in sufficient *weight* in *Tibbs v. Florida*. In order to meet the requirements of *Jackson v. Virginia*, it would only be necessary that any rational juror find the elements of the

offense to have been proven beyond a reasonable doubt, without regard to any corroboration of an accomplice witness. However, Vernon's Ann.C.C.P. art. 38.14 constitutes an additional state-created standard that governs the *weight* of the evidence sufficient to convict.

It is also significant that Art. 38.14 does not speak in terms of an "acquittal." Instead, it reads "[a] conviction cannot be had. . . . " Therefore, the reversal on appeal cannot be considered as an implied acquittal of the offense. Thus, the situation in this case would not be determined by the principle referred to by the Supreme Court in *Burks* that an acquittal, no matter how erroneous, would be afforded absolute finality. As such, the appellate court's determination of evidentiary insufficiency in this case would be the same as an appellate court's determination of factual insufficiency, pursuant to *Clewis v. State*, 922 S.W.2d 126 (Tex.Cr.App. 1996).[2] In neither case does the reviewing court's determination that the evidence is insufficient to support the jury's verdict constitute a double jeopardy bar to reprosecution.

---

[2] In *Clewis*, the Court of Criminal Appeals described the double jeopardy consequences of an appellate reversal due to evidentiary insufficiency in the following manner: "[Rletrial is prohibited where the reviewing court determines that the evidence is insufficient under *Jackson*. That is, as a practical matter, the State has only one opportunity to present evidence *legally* sufficient to convict a defendant." *Id.*, at 136. (Emphasis in original).

PRAYER FOR RELIEF

WHEREFORE, the State of Texas prays that the Court of Criminal Appeals grant this Petition for Discretionary Review, that the case be set for submission, and that after submission, this Court reverse the decision of the Court of Appeals.

Respectfully submitted,

MATTHEW PAUL
State Prosecuting Attorney
Bar I.D. No. 15641050

/s/ Jeffery L. Van Horn
JEFFREY L. VAN HORN
First Assistant State's Attorney
Bar I.D. No. 20446700

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 19th day of February, 1998, the following have been completed:

(1) The original and one legible copy of the above and foregoing petition and supporting brief have been mailed, postage prepaid, to the Clerk of the Fourth Court of Appeals at San Antonio for filing and handling in that Court pursuant to Tex.R.App.P. 68.3 of the Texas Rules of Appellate Procedure.

(2) Eleven legible copies of said petition have been filed with the Clerk of the Court of Criminal Appeals in accordance with Tex.R.App.P. 68.3 as adopted by the Court of Criminal Appeals.

(3) A legible copy of said petition has been mailed by U.S. Mail to:

Honorable Ed Shaughnessy
Assistant Criminal District Attorney
300 Dolorosa, Suite 5072
San Antonio, Texas 78205-3005

Honorable Suzanne M. Kramer
Attorney at Law
127 Lewis Street
San Antonio, Texas 78212

/s/ Jeffrey L. Van Horn
JEFFREY L. VAN HORN
First Assistant State's Attorney
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COURT OF APPEALS
FOURTH COURT OF APPEALS DISTRICT
300 DOLOROSA, SUITE 3200
BEXAR COUNTY CRIMINAL JUSTICE CENTER
SAN ANTONIO, TEXAS 78205-3037
HERB SCHAEFER, CLERK

June 9, 1998

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San Antonio, TX 78205-3030

RE: Court of Appeals Number: 04-96-00185-CR
Trial Court Case Number: 95-CR-0391

Style: Bruce Fernandez
v.
The State of Texas

Dear Counsel:

The Appellant's Motion for Request of Publication of Opinion in the above styled and numbered cause has this date been GRANTED.

Very truly yours,

HERB SCHAEFER, CLERK

/s/ Apryl Stirling
Apryl Stirling, Deputy Clerk

OFFICIAL NOTICE FROM COURT OF
CRIMINAL APPEALS OF TEXAS
P.O. BOX 12308, CAPITAL STATION,
AUSTIN, TEXAS 78711

OFFICIAL BUSINESS
STATE OF TEXAS
STATE PENALTY
FOR PRIVATE USE
ADDRESS SERVICE REQUESTED

On this day, the State's Petition for Discretionary Review filed by the State Prosecuting Attorney has been refused.

Troy C. Bennett, Jr.,

STEVEN C. HILBIG
BEXAR COUNTY CRIM
DIST ATTY
300 DOLOROSA SUITE 4025
SAN ANTONIO TX 78205-3030

FILE COPY

NO. 04-96-00185-CR

BRUCE FERNANDEZ, Appellant	IN THE COURT OF APPEALS
VS.	FOURTH COURT OF APPEALS DISTRICT
THE STATE OF TEXAS, Appellee	SAN ANTONIO, TEXAS

MOTION TO STAY MANDATE

(Filed Aug. 5, 1998)

To The Honorable Court of Appeals:

Now Comes, Steven C. Hilbig, Criminal District Attorney for Bexar County, Texas and files, pursuant to Rule 18.2, Tex. R. App. Proc., this motion to stay the issuance of the mandate in the instant case. In support of said motion the State would show the Court the following:

A.

The appellant was charged, by way of indictment, with two counts of Aggravated Robbery in cause Number 95-CR-0391. Punishment was assessed at twenty (20) years on each count, to be served concurrently.

B.

An appeal was pursued by the appellant. On January 21, 1998 this Court, in a published opinion authored by Justice John F. Onion, Jr. (sitting by assignment) reversed

the convictions and remanded the cause with instructions to order a judgment of acquittal. *See: Fernandez v. State*, (No. 04-96-00185-CR, Tex. App. – San Antonio, January 21, 1998). The State's Motion for Rehearing was denied on February 18, 1998.

C.

On February 20, 1998, a Petition for Discretionary Review was filed in this Court by the office of the State Prosecuting Attorney.

D.

On March 11, 1998, that petition was received and filed in the Court of Criminal Appeals.

E.

On July 8, 1998, the Court of Criminal Appeals refused the State's Petition for Discretionary Review.

F.

Rule 18.2, *supra* provides the following support for the granting of this motion.

> A party may move to stay issuance of the mandate pending the United States Supreme Court's disposition of a petition for writ of certiorari. The Motion must state the grounds for the petition and the circumstances requiring the stay. The appellate court authorized to issue the mandate may grant a stay if it finds that the grounds are substantial and that the petitioner

> or others would incur serious hardship from the mandate's issuance if the United States Supreme Court were late to reverse the judgment. In a criminal case, the stay will last for no more than 90 days, to permit the timely filing of a petition for writ of certiorari. After that period and others mentioned in this rule expire, the mandate will issue.

G.

The appellee, The State of Texas, is in the process of compiling a petition for writ of certiorari to be filed in the United States Supreme Court. The grounds to be alleged in that petition are as follows:

> Whether Texas courts have misconstrued the decisions *Burks v. United States*, 437 U.S.1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978); *Greene v. Massey*, 437 U.S. 19, 98 S.Ct. 2151, 57 L.Ed.2d 15 (1978); and *Tibbs v. Florida*, 457 U.S.31, 102 S.Ct. 2211, 72 L.Ed.2d 652 (1982) by ordering an acquittal when the conviction is reversed on appeal solely due to the failure to corroborate accomplice testimony, a clear state-law requirement that does not constitute an element of the offense.

H.

The State's petition for writ of certiorari is due to be filed on or before October 6, 1998. *See*: 13.1, Sup. Ct. R. The petition had been drafted but needs to be processed by a printer's office, outside of the District Attorney's office, in order to comply with the rules of the Supreme Court.

I.

If this court does not stay the mandate, the appellant will be pre-maturely released from the Institutional Division of the Texas Department of Criminal Justice.

Prayer

Wherefore, premises, considered the State would urge this Honorable Court to stay the issuance of its mandate in the instant case until such time as the State's petition for writ of certiorari is ruled upon by the Supreme Court of the United States.

Respectfully submitted,

/s/ Edward F. Shaughnessy, III
EDWARD F.
SHAUGHNESSY, III
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State Bar No. 18134500
(On Appeal)

Attorney for the State

CERTIFICATE OF SERVICE

I, EDWARD F. SHAUGHNESSY, III, Assistant Criminal District Attorney, Bexar County, Texas, hereby certify that a true copy of the above and foregoing Motion to Stay Mandate, was mailed to Ms. Suzanne Kramer, Attorney for Appellant, 126 Lewis St., San Antonio, Texas, 78212 on this 5th day of August, 1998.

/s/ Edward F. Shaughnessy, III
EDWARD F.
SHAUGHNESSY, III

CERTIFICATE OF SERVICE

I, EDWARD F. SHAUGHNESSY, III, Assistant Criminal District Attorney, Bexar County, Texas, hereby certify that a true copy of the above and foregoing Motion to Stay Mandate, was mailed to Mr. John Fahle, Attorney for Appellant, 930 S. Alamo St. No. 3, San Antonio, Texas, 78205 on this 5th day of August, 1998

/s/ Edward F. Shaughnessy, III
EDWARD F.
SHAUGHNESSY, III

CERTIFICATE OF SERVICE

I, EDWARD F. SHAUGHNESSY, III, Assistant Criminal District Attorney, Bexar County, Texas, hereby certify that a true copy of the above and foregoing Motion to Stay Mandate, was mailed to Mr. Jeffrey Van Horn, First

Assistant State's Attorney, P.O. Box 12405, Austin, Texas, 78711 on this 5th day of August, 1998.

/s/ Edward F. Shaughnessy, III
EDWARD F.
SHAUGHNESSY, III

COURT OF APPEALS
FOURTH COURT OF APPEALS DISTRICT
300 DOLOROSA, SUITE 3200
BEXAR COUNTY CRIMINAL JUSTICE CENTER
SAN ANTONIO, TEXAS 78205-30307
HERB SCHAEFER, CLERK

August 5, 1998

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John J. Fahle
LAW OFFICE OF
JOHN J. FAHLE
930 South Alamo Street, Suite 3
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Jeffrey L. Van Horn
First Assistant State's Attorney
P.O. Box 12405
Austin, TX 78711

RE: Court of Appeals Number: 04-96-00185-CR

Trial Court Case Number: 95-CR-0391

Style: Bruce Fernandez
v.
The State of Texas

Dear Counsel:

The State's Motion to Stay Mandate in the above styled and numbered cause has this date been received and filed.

Very truly yours,

HERB SCHAEFER, CLERK

/s/ Susan Baird
SUSAN BAIRD, DEPUTY CLERK

COURT OF APPEALS
FOURTH COURT OF APPEALS DISTRICT
300 DOLOROSA, SUITE 3200
BEXAR COUNTY CRIMINAL JUSTICE CENTER
SAN ANTONIO, TEXAS 78205-30307
HERB SCHAEFER, CLERK

August 19, 1998

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P.O. Box 12405
Austin, TX 78711

RE: Court of Appeals Number: 04-96-00185-CR

Trial Court Case Number: 95-CR-0391

Style: Bruce Fernandez
v.
The State of Texas

Dear Counsel:

The State's Motion to Stay Mandate in the above styled and numbered cause has this date been DENIED.

Very truly yours,

HERB SCHAEFER, CLERK

/s/ Apryl Stirling
Apryl Stirling, Deputy Clerk

COURT OF APPEALS
FOURTH COURT OF APPEALS DISTRICT
300 DOLOROSA, SUITE 3200
BEXAR COUNTY CRIMINAL JUSTICE CENTER
SAN ANTONIO, TEXAS 78205-30307
HERB SCHAEFER, CLERK

September 1, 1998

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Jeffrey L. Van Horn
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Austin, TX 78711

RE: Court of Appeals Number: 04-96-00185-CR

Trial Court Case Number: 95-CR-0391

Style: Bruce Fernandez
v.
The State of Texas

Dear Counsel:

The Court has this date issued the Mandate in the above styled and numbered cause.

Very truly yours,

HERB SCHAEFER, CLERK

/s/ Cynthia A. Martinez

Cynthia A. Martinez, Deputy

Texas Code of Criminal Procedure,
Art. 38. 14. Testimony of accomplice

A conviction cannot be had upon the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant with the offense committed; and the corroboration is not sufficient if it merely shows the commission of the offense.

Texas Penal Code,
§ 29.03. Aggravated Robbery

(a) A person commits an offense if he commits robbery as defined in Section 29.02, and he:

(1) causes serious bodily injury to another;

(2) uses or exhibits a deadly weapon; or

(3) causes bodily injury to another person or threatens or places another person in fear of imminent bodily injury or death, if the other person is:

(A) 65 years of age or older; or

(B) a disabled person.

(b) An offense under this section is a felony of the first degree.

(c) In this section, "disabled person" means an individual with a mental, physical, or developmental disability who is substantially unable to protect himself from harm.

Texas Penal Code,
§ 29.02. Robbery

(a) A person commits an offense if, in the course of committing theft as defined in Chapter 31 and with intent to obtain or maintain control of the property, he:

(1) intentionally, knowingly, or recklessly causes bodily injury to another; or

(2) intentionally or knowingly threatens or places another in fear or imminent bodily injury or death.

(b) An offense under this section is a felony of the second degree.

Texas Penal Code,
§ 2.01. Proof Beyond a Reasonable Doubt

All persons are presumed to be innocent and no person may be convicted of an offense unless each element of the offense is proved beyond a reasonable doubt. The fact that he has been arrested, confined, or indicted for, or otherwise charged with, the offense gives rise to no inference of guilt at his trial.

COMPILATION OF RELATED DECISIONS

Federal Cases

Government of Virgin Islands v. Civil, 591 F.2d 255 (3rd Cir. 1979)
DuBois v. Lockhart, 859 F.2d 1314 (8th Cir. 1988)

Alabama

Peacock v. State, 369 So.2d 61 (Ala.Cr.App. 1979)
McCoy v. State, 397 So.2d 577 (Ala.Cr.App. 1981)
Mills v. State, 408 So.2d 187 (Ala.Cr.App. 1981)
Caldwell v. State, 418 So.2d 168 (Ala.Cr.App. 1981)
Massey v. State, 497 So.2d 590 (Ala.Cr.App. 1986)
Garth v. State, 580 So.2d 118 (Ala.Cr.App. 1991)

Arkansas

Pollard v. State, 264 Ark. 753, 574 S.W.2d 656 (Ark. 1978)
Roleson v. State, 272 Ark. 346, 614 S.W.2d 656 (Ark. 1981)
Strickland v. State, 16 Ark.App. 293, 701 S.W.2d 127 (Ark.App. 1985)
Foster v. State, 290 Ark. 495, 722 S.W.2d 869 (Ark. 1987)
Williams v. State, 328 Ark. 487, 944 S.W.2d 822 (Ark. 1997)

Idaho

State v. Byers, 102 Idaho 159, 627 P.2d 788 (Idaho 1981)

Montana

State v. Warren, 192 Mont. 436, 628 P.2d 292 (Mont. 1981)

Oklahoma

Nunley v. State, 601 P.2d 459 (Okla.Cr.App. 1979)
Frye v. State, 606 P.2d 599 (Okla.Cr.App. 1980)

Tennessee

State v. Williford, 824 S.W.2d 553 (Tenn.Cr.App. 1991)

Texas

Ex parte Colunga, 587 S.W.2d 426 (Tex.Cr.App. 1979)
Ex parte Reynolds, 588 S.W.2d 900 (Tex.Cr.App. 1979)
Sheets v. State, 606 S.W.2d 864 (Tex.Cr.App. 1980)
Walker v. State, 615 S.W.2d 728 (Tex.Cr.App. 1981)
Hernandez v. State, 636 S.W.2d 617 (Tex.App. – San Antonio 1982)
Davis v. State, 675 S.W.2d 331 (Tex.App. – San Antonio 1984)
Castaneda v. State, 682 S.W.2d 535 (Tex.Cr.App. 1984)
Cruz v. State, 690 S.W.2d 246 (Tex.Cr.App. 1985)
Matter of J.R.R., 696 S.W.2d 382 (Tex. 1985)
Martinez v. State, 705 S.W.2d 772 (Tex.App. – San Antonio 1986)
Westwood v. State, 711 S.W.2d 343 (Tex.App. – Texarkana 1986)
Vargas v. State, 736 S.W.2d 847 (Tex.App. – San Antonio 1987)
Moreno v. State, 761 S.W.2d 407 (Tex.App. – Houston [14th Dist.] 1988)
Moron v. State, 779 S.W.2d 399 (Tex.Cr.App. 1985)
Sheffield v. State, 847 S.W.2d 251 (Tex.App. – Tyler 1992)
Munoz v. State, 853 S.W.2d 558 (Tex.Cr.App. 1993)
McDuff v. State, 943 S.W.2d 517 (Tex.App. – Austin 1997)
Badillo v. State, 963 S.W.2d 854 (Tex.App. – San Antonio 1998)

(2)

NO. 98-543

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

THE STATE OF TEXAS,
PETITIONER

VS.

BRUCE FERNANDEZ,
RESPONDENT

RESPONDENT'S MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS* AND RESPONSE TO STATE'S PETITION FOR CERTIORARI

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ATTORNEYS FOR RESPONDENT,
BRUCE FERNANDEZ

463 FP

NO. 98-543

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

THE STATE OF TEXAS,
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TX STATE BAR NO. 11707550

ATTORNEYS FOR RESPONDENT,
BRUCE FERNANDEZ

NO. 98-543

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

THE STATE OF TEXAS-PETITIONER

VS.

BRUCE FERNANDEZ-RESPONDENT(S)

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

The petitioner asks leave to file the attached response to State of Texas's petition for certiorari *in forma pauperis.*

Petitioner has previously been granted leave to proceed *in forma pauperis* in the following court(s):

227th Criminal District Court, Bexar County, Texas

Fourth Court of Appeals District, Bexar County, Texas

Petitioner's affidavit or declaration in support of this motion is attached hereto.

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Attorneys for Respondent
Bruce Fernandez

AFFIDAVIT OR DECLARATION
IN SUPPORT OF MOTION FOR LEAVE TO PROCEED *IN FORMAS PAUPERIS*

I, Bruce Fernandez, am the respondent in the above entitled case. In support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of this case or to give security therefor; and I believe I am entitled to redress.

I further swear that the responses I have made to the questions and instructions below relating to my ability to pay the cost of proceeding in this Court are true.

1. Are you presently employed? **Yes**

a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

Priority Personnel
105 IH-35 South
New Braunfels, Texas 78130
$920.00

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other sources? Yes___ **No X**

3. Do you own any cash or having a checking or savings account? Yes ____ No **X**

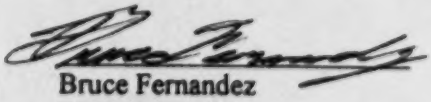
4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing) Yes ____ No **X**

5. List the persons who are dependant upon you for support and state your relationship to those persons.

N/A

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: October 23, 1998.



Bruce Fernandez
Respondent

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REASONS FOR DENYING THE WRIT

Reason for Denying Review Number One: Petitioner, the State of Texas, failed to preserve the issue presented in its writ of certiorari for review by this Court, because (1) the Petitioner advanced this issue for the first time in its petition for rehearing, (2) there was no opinion below analyzing this issue, and (3) the Fourth Court of Appeals of Texas declined to analyze the issue when it denied the petition for rehearing.

In *Wills v. Texas*, this Court ruled:

> It has been the traditional practice of this Court, however, to decline to review claims raised for the first time on rehearing in the court below. Following this practice here makes good sense because we do not have the benefit of a decision analyzing the application of *Penry* to the facts of petitioner's case.

511 U.S. 1097 (1994)(citations omitted). Here, the Petitioner has similarly raised an issue in its writ of certiorari after raising it for the first time in its petition for rehearing in the State courts. In fact, the Petitioner specifically argued in its original brief on direct appeal that Respondent's arguments were "in actuality, an attack on the sufficiency of the evidence." *App. Tab 2 at 10.* This Court should follow its precedent establishing that issues are not properly preserved for review by this Court when they are advanced for the first time in a petition for rehearing. *Id.*; *Board of Directors of Rotary Internat. v. Rotary Club of Durante*, 481 U.S. 537, 549 (1987); *Prudential Fed. Sav. & Loan Assn. v. Flanigan*, 478 U.S. 235 (1986); *Radio Station WOW v. Johnson*, 326 U.S. 120, 128 (1945).

Furthermore, Petitioner's actions have wrongfully excluded the state court from considering the state statute in light of its constitutional claims, and have also precluded the state court from considering said issue on independent, adequate state grounds. As this Court explained:

> Questions not raised below are those on which the record is very likely to be inadequate, since it certainly was not compiled with those questions in mind. And in a federal system it is important that state courts be given the first opportunity to consider the applicability of state statutes in light of constitutional challenge, since the statutes may be construed in a way which saves their constitutionality. Or the issue may be blocked by an adequate state ground. Even though States are not free to avoid constitutional issues on inadequate state grounds, . . . they should be give the first opportunity to consider them.

Cardinale v. Louisiana, 394 U.S. 437, 439 (1969).

Here, the state court has never analyzed this exact issue and they should have a chance to address it. *Id.* Furthermore, it is possible that, given the opportunity and proper briefing, the state court would have found that there are adequate and independent state grounds supporting the holding of the Fourth Court, thus precluding federal review. *Id.* For example, Texas courts have interpreted article V, section 26 of the Texas Constitution as also barring a second trial once a defendant has been acquitted. *See, e.g., State v. Westergren*, 707 S.W.2d 260, 263 (Tex. App.-Corpus Christi 1986); *Ex Parte Augusta*, 639 S.W.2d 481, 485 (Tex. Crim. App. 1982). Here, this state ground is applicable because when evidence is insufficient to corroborate an accomplice witness, a jury cannot properly return any verdict except an acquittal. *Ex Parte Reynolds*, 588 S.W.2d 900, 902 (Tex. Crim. App. 1979), *cert. denied*, 445 U.S. 920 (1980). Therefore, state double jeopardy protection may preclude this issue from receiving a review on federal grounds, and at the very least, the state court should be afforded the opportunity to consider this issue. *Webb v. Webb*, 101 S.Ct. 1889, 1893-94, 451 U.S. 493, 498-502 (1981). The state courts here lacked opportunity to analyze the constitutional claims now raised by the state. Further, the state courts were denied the chance to apply existing adequate, independent state law. Either reason is

sufficient for this Court to deny this writ.

Reason for Denying Review Number Two: The Question Presented is Misstated. The real issue this case presents — whether the Double Jeopardy Clause protects a defendant from retrial, where, under state law, the State failed its burden of proof at trial — was conclusively resolved by this Court two decades ago in *Burks v. United States*, 437 U.S. 1 (1978), and *Greene v. Massey* 437 U.S. 19 (1978).

Petitioner's statement of the Question Presented misstates the issue, and injects a red herring into this Court's Double Jeopardy precedents, implying that this Court's previous jeopardy determinations have somehow turned on an elements test, rather than on a finding that the prosecution had failed in its burden of proof, whatever that burden may have been.

However, this Court has repeatedly made clear that the protections of the Double Jeopardy Clause do not depend on the prosecution's failure as to *elements* of the offense charged, but instead are implicated *whenever* the state fails in its burden of proof.

> The Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding. . . . The principle that the Double Jeopardy Clause does not preclude the Government's retrying a defendant whose conviction is set aside because of an *error in the proceedings* leading to conviction is a well-established part of our constitutional jurisprudence. . . . The same cannot be said when a defendant's conviction has been overturned due to a failure of proof at trial, in which case the prosecution cannot complain of prejudice, for it has been given one fair opportunity to offer whatever proof it could assemble.

Burks, 437 U.S. 11 — 16.

This prohibition, lying at the core of the Clause's protections,

> prevents the State from honing its trial strategies and perfecting its evidence through successive attempts at conviction. Repeated prosecutorial sallies would unfairly burden the defendant and create a risk of conviction through sheer governmental perseverance. For this reason, when a reversal rests upon the ground that the prosecution has failed to produce sufficient evidence to prove its case, the Double Jeopardy Clause bars the prosecutor from making a second attempt at conviction.

Tibbs v. Florida, 457 U.S. 31, 41 (1982) (citations omitted). The word "element" is conspicuous in the above analysis only by its absence. What remains to be determined, then, is what constitutes "insufficient" evidence, for Double Jeopardy purposes. If it is not, as the Petitioner suggests, a lack of proof of the elements of offense, then how can we ever know that the proof is legally insufficient? The answer was supplied by this court a few years after *Burks* and *Greene*, in *Tibbs*, which defined insufficient evidence.

> [T]he Double Jeopardy Clause precludes retrial once the reviewing court has found the evidence legally insufficient to support conviction. This standard, we explained, means that the government's case was so lacking that it should not have even been ***submitted*** to the jury. . . . A verdict of not guilty, whether rendered by the jury or directed by the trial judge, absolutely shields the defendant from retrial. A reversal based on the insufficiency of the evidence has the same effect because it means that no rational factfinder could have voted to convict the defendant. . . . A reversal [on the ground of weight of evidence], unlike a reversal based on insufficient evidence, does not mean that acquittal was the only proper verdict.

Tibbs, at 40-42 (emphasis in original) (citations omitted).

Accordingly, the issue then becomes whether acquittal is the only proper verdict under Texas law where the state has failed to provide the requisite corroboration. That is, should such a case even be ***submitted*** to the jury? Texas Code of Criminal Procedure art. 38.17 mandates that:

> In all cases where, by law, two witnesses, or one with corroborating circumstances, are required to authorize a conviction, if the requirement be not fulfilled, the court shall instruct the jury to render a verdict of acquittal, and they are bound by the instruction.

Texas courts have interpreted this rule to mean that the prosecution has one additional burden of proof in a crime where accomplice testimony is involved: corroborating circumstances.

> In this jurisdiction, when the evidence is insufficient to corroborate an accomplice witness, the jury cannot properly return any verdict except an acquittal.[1]

Ex Parte Reynolds, 588 S.W.2d 900, 902 (Tex. Crim. App. 1979), *cert. denied*, 445 U.S. 290 (1980). The test is to remove the accomplice's testimony and then inquire whether any of the remaining evidence tends to connect the accused to the commission of the crime. *Reed v. State*, 744 S.W.2d 112, 126 (Tex. Crim. App. 1988). All the facts and circumstances in evidence may be looked to. *Washburn v. State*, 318 S.W.2d 627, 634 (Tex. Crim. App. 1958); *Brown v. State*, 561 S.W.2d 484 (Tex. Crim. App. 1978). Furthermore, the inquiry is very fact-intensive and case-specific and there is no weighing of the evidence to determine guilt, because it is not necessary that the corroboration directly link the accused to the crime or be sufficient in itself to establish guilt. *Mitchell v. State*, 650 S.W.2d 801 (Tex. Crim. App. 1983); *cert. denied*, 464 U.S. 1073 (1984); *Attwood v. State*, 509 S.W.2d 342 (Tex. Crim. App. 1974). Consequently, in the state of Texas, the only proper verdict when the evidence is insufficient to corroborate an accomplice witness is an acquittal, either by the judge, the jury, or the appellate court. Whatever the ultimate vehicle of the acquittal, the State has failed to present a submissible case, and retrial is

---

[1]Thus, footnote 1 on page 6 of the State's Petition for Certiorari in this case is simply wrong.

therefore prohibited under *Burks, Greene,* and *Tibbs.*.

The Petitioner's argument in this case becomes ridiculous when carried through to its logical conclusion: if an acquittal by the appellate Court based on insufficient corroboration does not bar retrial, then why would an acquittal by the jury on the same grounds bar retrial? Would the State have special issues presented to criminal juries whenever accomplice witness testimony is involved, and retry Defendants who were acquitted only because the jury was not satisfied on the "accomplice witness" special issue?

Reason for Denying Review Number Three: Petitioner's First Reason for Granting Review is a misstatement of the law. Contrary to the State's assertion, this Court has held that, for Double Jeopardy purposes, the definition of legal sufficiency is a state-law matter, bounded only on the *lower* end by the Due Process Clause. Thus, the State Courts in this case have not decided any issue of federal law.

The State of Texas would have the reader of its petition believe that the definition of legally sufficient evidence, for purposes of the Double Jeopardy Clause, is limited by federal Due Process considerations to the minimum standard expressed by this Court in *Jackson v. Virginia,* 443 U.S. 307 (1979). While this Court has held that the Due Process Clause places a *lower* boundary on the definition of legally sufficient evidence, it has never held that there is an upper limit to that term, limiting the protection a State may provide its citizens. To the contrary, the Court has consistently held that the definition of "legally sufficient evidence," as well as the application of that definition to any particular set of facts, is strictly a matter of state law, so long as it comports with the minimum standards set out in *Jackson, supra.*

> The Florida Supreme Court then classified *Tibbs I* as a reversal resting on the weight of the evidence.
>
> . . .
>
> We held in *Jackson* that the Due Process Clause forbids any conviction based on evidence insufficient to persuade a rational factfinder of guilt beyond a reasonable doubt. The Due Process Clause, in other words, sets a *lower limit* on an appellate court's definition of evidentiary sufficiency.
>
> . . .
>
> Any ambiguity regarding *Tibbs I*, finally, was resolved by the Florida Supreme Court in *Tibbs II*. Absent a conflict with the Due Process Clause, that court's construction of its prior opinion binds this Court.

Tibbs, 457 U.S. at 45 (emphasis added). *See also Greene v. Massey*, 437 U.S. 19, 25 (1978)(case remanded to state court for clarification of application of state evidentiary sufficiency test). Thus, the Petitioner's First Reason for Granting Review is simply a misstatement; the State Courts have not decided *any* question of federal law, but have instead followed established Supreme Court precedent which dictates that the definition of "legally sufficient evidence" is a matter of state law.

Reason for Denying Review Number Four: The State Court determination in this case conflicts only with the dissents cited by Petitioner, and not with the relevant decisions of this Court, as alleged by Petitioner in its Second Reason for Granting the Writ.

On page 8 of its Petition for Discretionary Review, Petitioner quotes language from *Tibbs* which, if anything supports Respondent's position, because it emphasizes the Supreme Court's reliance on the state court's determination of state law as to what constitutes sufficient evidence.

Petitioner correctly points out that the rule is that federal Double Jeopardy protections do not arise unless the evidence from the first trial is legally insufficient to sustain a conviction. What the Petitioner apparently fails to grasp is that this Court has traditionally deferred to state law to determine the definition of "legally insufficient." It begs the question to merely recite that only legally insufficient evidence will invoke Double Jeopardy protection, without acknowledging the definition of that term.

Petitioner then argues that the dissenting opinion in *Tibbs* is somehow the final arbiter of the meaning of the majority opinion, and further argues that "Obviously, the majority of the Court rejected [the dissent's] interpretation." *State's Petition for Certiorari,* at 10. In fact, the majority of the Court did not even address the quoted portion of the dissent. That part of the dissent takes the rather untenable position that the majority is basing its holding on a distinction between whether state or federal law was the basis of the reversal — a holding which can be found nowhere in the majority opinion. The only relevance of the state law versus federal law issue is to determine the definition of "legally insufficient evidence." Once that determination has been made, the Double Jeopardy analysis is identical whether the case is a prosecution based on state or federal law: cases which were reversed for legally insufficient evidence cannot be retried; cases which weren't, can. Indeed, quite contrary to the belief of the dissent in *Tibbs, all* reversals implicating the Double Jeopardy Clause originate in a failure of proof under State law (unless the prosecution originated in federal court), which must be at least as stringent as required by the Due Process Clause.

The State next relies on *United States v. Scott,* 437 U.S. 82 (1978) for the proposition that "a defendant is acquitted only when the ruling of the judge, whatever its label, actually represents

a resolution in the defendant's favor , correctly or not, of some or all of the factual elements of the offense charged." *Petition for Certiorari,* at 12.

Petitioner's argument here is nothing but a rehashing of the arguments presented by the State of Arkansas in *DuBois v. Lockhart,* 859 F.2d 1314 (8th Cir. 1988), and roundly rebuffed by the Eighth Circuit Court of Appeals.

> The State also points out that an acquittal requires a resolution of some or all of the factual elements of the offense. According to the State, such a resolution would only turn on accomplice testimony if corroboration of accomplice testimony were an element of the charged crime, could negate DuBois' culpable mental state, or amounted to a failure to rebut a justification defense. Since it is none of these, a lack of accomplice corroboration cannot amount to an acquittal.
>
> The question, however, is not whether corroborated accomplice testimony is an element of the crime but whether it affects the proof required for a conviction. Clearly, under the Arkansas statute, it does, because without submission of such corroboration, a conviction is not permissible. The Arkansas statute affects the resolution of every element of a crime. Under the statute, any amount of proof submitted by the prosecution is deficient, unless accomplice testimony is corroborated.

DuBois, 859 F.2d at 1317.

By the same token, under Texas law — specifically *Tx.C.Cr.P. Art.38.17* and interpretive case law — an acquittal on the grounds of insufficient corroboration of accomplice testimony affects the resolution of every element of any crime. *See Ex Parte Reynolds,* 588 S.W.2d 900 (Tx.Cr.App. 1979).

Finally, the Petitioner relies on the dissent of Justice Brennan in *Justices of Boston Municipal Court v. Lydon,* 466 U.S. 294 (1984) for the proposition that the standard necessary to

invoke a double jeopardy bar to reprosecution is one of "constitutional insufficiency." *Petition for Certiorari,* at 13. Even if a state court judgment which conflicts with a *dissent* by a Justice of this Court constitutes any cognizable ground for review, such is not the case here, because the state misinterprets even the dissent it quotes. The state seems to believe that Justice Brennan's contrasting of trial error with "constitutionally insufficient evidence" means that only constitutionally insufficient evidence bars retrial. The first difficulty with this argument is that Justice Brennan never defines the term "constitutionally insufficient evidence." It may mean nothing more than evidence which fails, under the Due Process Clause, to measure up to the quantity and quality of proof required by state law — whether it relates to the elements of the offense or to other matters required to be proved, such as corroboration of accomplice testimony.

Additionally, even if "constitutionally insufficient evidence" means evidence which fails to prove the elements of the offense, Justice Brennan does not argue that the Double Jeopardy Clause is implicated *only* in the face of such a deficiency; he merely states that that is one situation which bars retrial. Such a statement does not exclude other situations simply by failing to mention them. For example, Justice Brennan's dissent also fails to mention reversals for intentional prosecutorial misconduct as a basis for invoking the Double Jeopardy Clause. No one would argue, however, that such is therefore not the law. *See Oregon v. Kennedy,* 456 U.S. 667 (1982).

Finally, even if Justice Brennan did mean that only a reversal based on a failure to prove the essential elements of the offense would invoke the Double Jeopardy Clause, it must be remembered that this is a *dissent,* and is therefore not the law.

Reason for Denying Review Number Five: To allow a reprosecution in this particular case

would offend the core protection offered by the Double Jeopardy Clause.

What the Petitioner's statement of facts fails to mention is that the State actually had in its possession, at the time of trial, evidence which would unquestionably have been sufficient to corroborate the testimony of the accomplice, and that, after offering that evidence, withdrew same as a matter of trial strategy. The State now understandably regrets that strategy decision, and wants a "do-over." If there is anything that the Double Jeopardy Clause is intended to protect against, it is this.

After the accomplice witness testified, the State offered into evidence a written confession given by Respondent Fernandez, which tracked the accomplice's testimony almost word for word. *Compare App. Tab 3, with App. Tab 4.* There is no doubt that, if this confession were both admissible and admitted, the accomplice's testimony would have been sufficiently corroborated.

The Defense requested a hearing pursuant to *Jackson v. Denno*, 378 U.S. 368 (1964). *App. Tab 5.* In the course of that hearing, Defense counsel learned that both a polygraph examination and the confession had been taken without Fernandez's attorney's knowledge, after he had sat in jail for ten days, had requested an attorney, and had been appointed an attorney. *App. Tab 5, at 315 - 316; 371 - 72; 376.* The Defense argued that the confession should be excluded on the ground that it was taken in violation of the Defendant's Fifth and Sixth Amendment rights to counsel. *App. Tab 5 at 343 - 344.* The State countered that, because the Sixth Amendment right to counsel is offense-specific, *McNeil v. Wisconsin*, 501 U.S. 169 (1991), and because the Defendant had invoked his right to counsel only as to the related criminally negligent homicide (for which he was not on trial), the confession was admissible in the trial of the

two aggravated robberies. *App. Tab 5 at 343.*

The trial Court took the matter under advisement and took a short break, *App. Tab 5 at 393*, after which the Prosecution returned to the courtroom and withdrew its offer of the confession into evidence, making the strategic decision to attempt to otherwise corroborate the accomplice testimony, rather than possibly tainting the conviction with an inadmissible confession. *App. Tab 5 at 344.*

This Court has held that this type of honing of trial strategies by the State is precisely the evil that the Double Jeopardy Clause is aimed at preventing.

> *Burks* and *Greene* implement the principle that the Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding. This prohibition, lying at the core of the Clause's protections, prevents the State from honing its trial strategies and perfecting its evidence through successive attempts at conviction. Repeated prosecutorial sallies would unfairly burden the defendant and create a risk of conviction through sheer governmental perseverance.

Tibbs, 457 U.S. at 41.

Indeed, given the above purposes, the Double Jeopardy Clause would be less offended in a case where the prosecution wished to retry an acquitted defendant on the grounds that the government had discovered new evidence after the acquittal, which it had made attempts to find and had in good faith been unable to find before the trial. At least in such a case, the prosecution would be acting in good faith. Here, by contrast, the prosecution had the evidence all along, chose not to offer it, and now simply doesn't want to live with the consequences of its strategic choice. Such a position is nothing more than poor sportsmanship.

This Court should refuse the Writ.

Regarding Petitioner's Compilation of Related Decisions

In Petitioner's Compilation of Related Decisions, App. 66-67, Petitioner erroneously cited the references listed below. Respondent requests that this Court take note that some of the cases have been either reversed or overruled. These cases are in conflict with the proper standard for finding corroboration of accomplice testimony and should not be followed, cited, or used as authority.

Furthermore, Petitioner grossly exaggerates the issue's "sweeping application across numerous jurisdictions in this country." *Petition for a Writ of Certiorari*, at 4. If the writ is granted, application will not be so sweeping, as only fifteen jurisdictions retain an accomplice testimony statute, and even this number is dwindling. *Badillo v. State*, 963 S.W.2d 854, 861 (Tex. App.-San Antonio 1998) (Justice Rickhoff, concurring). Furthermore, the issue presented here is as applied under Texas law, and Texas law should not be considered typical over all fifteen jurisdictions because Texas accomplice witness law is the strictest in application. *Id.* Consequently, not only does the issue presented here fail to have national scope, but it may also fail to have application in these other jurisdictions.

Texas

Ex parte Colunga, 587 S.W.2d 426 (Tex. Crim. App. 1979), *cert. denied*, 445 U.S. 290 (1980).

(1980).

Sheets v. State, 606 S.W.2d 865 (Tex. Crim. App. 1981), *overruled by Reed v. State*, 744 S.W.2d 112, 125 (Tex. Crim. App. 1988).

Hernandez v. State, 636 S.W.2d 617 (Tex. App.-San Antonio 1982), *reversed*, 651 S.W.2d 746 (Tex. Crim. App. 1983).

Davis v. State, 675 S.W.2d 331 (Tex. App-San Antonio 1984), *overruled by Reed v. State*, 744 S.W.2d 112, 125 (Tex. Crim. App. 1998).

Conclusion

For all the above reasons, this Court should deny the petition for writ of certiorari.

Respectfully submitted,

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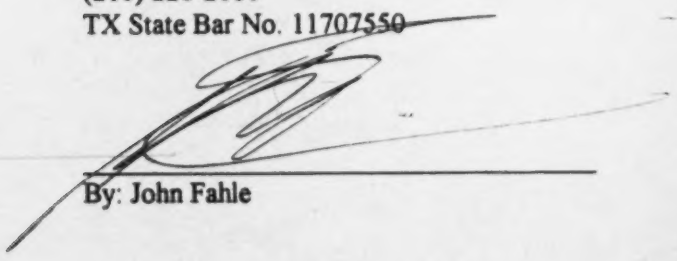

By: John Fahle

Certificate of Service

I hereby certify that a true and correct copy of the above document have been served in accordance with the Rules of the Supreme Court of the United States, Rule 29.3 and Rule 33.2. Service consist of the hand delivery to Honorable Ed Shaughnessy, District Attorney's Office, 300 Dolorosa, San Antonio, Texas 78205, and First class mail to Jeffery L. Van Horn and Matthew W. Paul, P.O. Box 12405, Austin, Texas 78711 on this 27th day of October, 1998.

John Fahle

Texas Code of Criminal Procedure
Art. 38.17. Two Witnesses Required

In all cases where, by law, two witnesses, or one with corroborating circumstances, are required to authorize a conviction, if the requirements be not fulfilled, the court shall instruct the jury to render a verdict of acquittal, and they are bound by the instruction.

FILED
IN THE COURT OF APPEALS
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4-96-00185-CR

NO. 04-96-00185-CR

IN THE COURT OF APPEALS
FOURTH COURT OF APPEALS DISTRICT
SAN ANTONIO, TEXAS

BRUCE FERNANDEZ,

Appellant

V.

THE STATE OF TEXAS,

Appellee

ON APPEAL FROM THE 227TH DISTRICT COURT
OF BEXAR COUNTY, TEXAS
CAUSE NUMBER 95-CR-0391

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NO. 04-96-00185-CR

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NO. 04-96-00185-CR

BRUCE FERNANDEZ,	§	COURT OF APPEALS, FOURTH
Appellant	§	
V.	§	COURT OF APPEALS DISTRICT
THE STATE OF TEXAS,	§	
Appellee	§	SAN ANTONIO, TEXAS

BRIEF FOR THE STATE

TO THE HONORABLE COURT OF APPEALS:

NOW COMES, Steven C. Hilbig, Criminal District Attorney of Bexar County, Texas, and files this brief for the State. The Appellant, BRUCE FERNANDEZ, was indicted for the offense of AGGRAVATED ROBBERY, Cause Number 95-CR-0391. (R.I-4). Trial was before a jury in the 227th Judicial District Court of Bexar County, Texas, the Honorable Mike Machado, Judge presiding. The Appellant was found guilty of the offense charged in the indictment and punishment was assessed as imprisonment for 20 years in the Texas Department of Criminal Justice Institutional Division. (R.I-70). Notice of appeal was given. (R.I-75).

RULE 74(f) STATEMENT

The State challenges the factual assertions contained in Appellant's brief pursuant to Tex.R.App.P. 74(f). The State will provide its quotations of evidence and/or summary of evidence adduced from the record in its response contained herein.

STATEMENT OF FACTS

Appellant was charged with two counts of aggravated robbery by indictment on November 29, 1994. (R.I-4). Appellant pleaded not

true and a trial before a jury was had. (R.I- 66-68). The jury found Appellant guilty on both counts and sentenced him to 20 years confinement on each count. (R.I-66-68). The trial court ordered the sentences to run concurrently. (R.VI- 58-59).

During the guilt/innocence phase of trial, the State introduced evidence through eight witnesses. Rudy Ybarra was the State's first witness. Ybarra, an accomplice, testified that on October 20, 1994, he met with Appellant shortly after school. (R.III-25). Ybarra and Appellant later met up with Carlos Garibay and Jerry Lopez around 9:00 or 9:30 p.m. at Appellant's home. (R.III-30). Ybarra stated that Jerry Lopez was driving a blue Dodge Dynasty and that he and Appellant, along with Carlos Garibay, got into the car with Jerry Lopez. (R.III-32).

According to Ybarra, Appellant and Jerry Lopez began talking about "jacking" or robbing someone. (R.III-47-48). The group, which included Jerry Lopez, Carlos Garibay, Ybarra, and Appellant, began to follow a pickup truck in order to steal the rims. (R.III-49). Ybarra stated that Appellant was the one who was going to rob the people because he was handed the gun from Carlos Garibay. (R.III-51). They followed the truck into a neighborhood off of Marbach street but the people in the truck were inside their house by the time the group arrived. (R.III-51).

The group then proceeded down Broadway street near the HEB supermarket in Alamo Heights where they spotted two cadillacs. (R.III-54-55). According to Ybarra, Appellant stated that he wanted to "jack" or rob one of the cadillacs. (R.III-55). They then began

to follow one of the cadillacs onto Austin Highway and then onto Sheraton Drive. (R.III-61).

As they followed the cadillac onto Sheraton Drive, Jerry Lopez turned off his headlights. (R.III-62). Ybarra stated that Appellant then jumped out of the car with the gun and snuck up to the people as they pulled into their driveway. (R.III-63). Ybarra testified that Appellant was wearing dark clothing and had a bandanna around his face and a cap on his head. (R.III-63-64). Ybarra witnessed Appellant pointing the gun at Mr. and Mrs. Morehouse as they were exiting their vehicle. (R.III-74).

Ybarra testified that he, along with Jerry Lopez and Carlos Garibay, decided to leave Appellant after seeing a police car pull onto Sheraton drive. (R.III- 75-76). However, as they stopped at a stop sign at the intersection of Austin Highway and Sheraton drive, Appellant jumped in the car with the gun and a purse. (R.III- 84). As Appellant jumped in the car the gun went off striking Jerry Lopez in the neck. (R.III- 86-87).

According to Ybarra, Appellant then jumped out of the car and said, "Y'all don't know me.". (R.III-87-88). As Appellant jumped out of the car the gun went off a second time but did not strike anyone. (R.III- 89). This was the last time Ybarra saw Appellant until the day of trial. (R.III-89-90).

After Appellant fled, Ybarra testified that Jerry Lopez managed to pull onto Austin Highway until Carlos Garibay grabbed the will and pulled the car to the side. (R.III-90). The three exited the vehicle and flagged down a San Antonio Police Department (S.A.P.D.)

officer for assistance. (R.III-91). Ybarra stated that Jerry Lopez was bleeding from his neck and coughing up blood. (R.III- 90-91). Ybarra told the officer that his friend had been shot.

Eventually, Emergency Medical Services (E.M.S.) arrived and attended to Jerry Lopez. (R.III- 96). The Terrel Hills police also arrived and informed the other officers that Ybarra, Carlos Garibay, and Jerry Lopez had been involved in a robbery. (R.III-97-98). Ybarra and Carlos Garibay were then arrested. (R.III-97).

Ybarra acknowledged that he had a plea bargain with the State in which he agreed to plea guilty to aggravated robbery and make himself available to testify against Appellant and Carlos Garibay. (R.III- 113-114).

Diana Morehouse testified next for the State. (R.III- 151). She stated that on October 20, 1994, she and her husband were returning from a charity event in their 1993 gray Cadillac Seville. (R.III-152-153). As they pulled into their garage and exited their vehicle, a man, waving a gun, ran into the driveway and yelled, "Give me your money, you mother fucker.". (R.III- 154-155). Mrs. Morehouse stated that the man held the gun in his left hand and had it turned sideways. (R.III-155). She further stated that she could not see his face because he was wearing a dark knitted cap and something around his face. (R.III-157). Mrs. Morehouse did notice that he had a slender build and that he was about five feet seven inches to five feet eight inches tall with olive colored skin. (R.III- 157).

Mrs. Morehouse gave the man her purse and saw her husband give him his money. (R.III-157). She testified that he took it without her permission and that she was terrified and in fear for her life. (R.III- 157).

Jeffrey Morehouse also testified for the state and basically reiterated the story told by his wife. (R.III-168-186). He stated that on October 20, 1994, he and wife were robbed at gun point by a man dressed in dark clothing with a mask over his face. (R.III-169-171). He described him as being a little taller than himself but with a thin build. (R.III- 177). Mr. Morehouse stated that he handed the man a money clip with three hundred to four hundred dollars. (R.III-172).

After the man took his money and his wife's purse, Mr. Morehouse testified that the perpetrator took off and jumped into the rear passenger side of a four door vehicle that was waiting for him. (R.III-175). Mr. Morehouse noticed three other people in the car that the perpetrator jumped into. (R.III-175). He also stated that he heard a gunshot as the car reached the corner of Morningside and Sheraton. Mr. Morehouse heard a second shot as the car reached the corner of Austin Highway and Sheraton. (R.III- 176). Concerned that they were shooting at him, Mr. Morehouse went inside his house and called 911. (R.III- 176).

Mr. Morehouse further testified that later the police informed him that several suspects had been found and brought him to a location on Austin Highway in order to identify the suspects. (R.III-178). At the scene, Mr. Morehouse saw the blue vehicle that

the perpetrator had jumped into and three suspects. (R.III-179). Mr. Morehouse felt that Jerry Lopez, who was in the ambulance, was too big to be the perpetrator that robbed him. (R.III- 179-180). He also could not identify the other two suspects, Rudy Ybarra and Carlos Garibay, as the perpetrator. (R.III- 180).

On his way back to his house, Mr. Morehouse assisted the police in locating the gun that was used in the robbery. (R.III- 181). He directed the police to the corner of Sheraton and Austin Highway where he heard the shots being fired. (R.III-181). A semi-automatic pistol was found. (R.III- 181).

Officer Andres DeLeon, of the Terrel Hills Police Department, also testified for the State. (R.III-187). He stated on October 20, 1994, at approximately 11:40 p.m., he noticed a Cadillac being followed by a blue four door Dodge with the headlights turned off. (R.III- 187-191). After a few minutes, Officer DeLeon followed the vehicle to the corner of Sheraton and Morningside. (R.III- 192). As he approached the corner of Sheraton and Morningside he witnessed a young man running from Mr. Morehouse's house heading south on Sheraton and up Morningside. (R.III- 192). Officer DeLeon described the suspect as between five feet seven inches and five feet eight inches tall with a slender build. (R.III- 194). He began to search for the suspect when he received a dispatch call about a robbery at the Morehouse residence. (R.III-195).

Having lost track of the blue Dodge during his search for the suspect on foot, Officer DeLeon saw the car again on Morningside as he responded to the dispatch call. (R.III-195). According to

Officer DeLeon, the blue Dodge made a right hand turn onto Sheraton followed by a right hand turn onto Austin Highway. (R.III-195). Instead of following the car, Officer DeLeon reported to the Morehouse's residence. (R.III-196).

While talking to the Morehouse's, Officer DeLeon received another dispatch call informing him that a vehicle matching the one he followed earlier was stopped on Austin Highway. (R.III-196-197). He proceeded to that scene and noticed that it was indeed the same vehicle he witnessed earlier. (R.III-198). Officer DeLeon spoke with two of the three suspects at the scene and requested that Mr. Morehouse be brought to the scene to identify the suspects. (R.III-200). He stated that Mr. Morehouse did not positively identify any of the three suspects as the robber. (R.III- 201).

Officer James Bennett, of the Terrel Hills Police Department, testified that on October 20, 1994, he brought Mr. Morehouse to the scene on Austin Highway to identify the suspects. (R.III-214). Afterward, Officer Bennett conducted a search with Mr. Morehouse for the gun that was used in the robbery. (R.III-214). The gun was found at the base of a telephone poll near the corner of Austin Highway and Sheraton Drive. (R.III-216-217).

Officer Mario Jacinto, of the San Antonio Police Department, testified that on October 20, 1994, he was responding to a call near 1100 Austin Highway when someone, later identified as Carlos Garibay, ran up and yelled, "My friend's been shot.". (R.III-227). Officer Jacinto called for backup and Emergency Medical Services. (R.III-229). He also stated that along with Carlos Garibay were two

other men, Rudy Ybarra and an injured male. (R.III-228-231). Officer Jacinto further testified that Carlos Garibay and Rudy Ybarra were eventually arrested because of their involvement in a robbery. (R.III-231).

Detective Donald Davis, of the Terrel Hills Police Department, recovered a nine millimeter shell casing from the back of the blue Dodge. (R.III-234). He also took charge of the semi-automatic handgun found near the intersection of Austin Highway and Sheraton Drive. (R.III-236). He stated that the weapon was jammed when it was found and that no attempt to lift fingerprints was made. (R.III-249-252). In addition, Detective Davis also recovered a lady's leather handbag and a small leather backpack which belonged to Carlos Garibay. (R.III-240-242).

Detective Davis interviewed the Appellant on October 21, 1994, at the Terrel Hills Police Department Criminal Investigation offices. (R.IV-404). After advising Appellant of his constitutional rights, Detective Davis asked Appellant if he was willing to waive those rights to make a statement. (R.IV-405-407). Appellant agreed to waive his rights and gave a statement to Detective Davis. (R.IV-411).

According to the statement, Appellant was walking Rudy Ybarra home between 7:30 p.m. and 8:00 p.m. on October 20, 1994. (R.IV-415). On the way to Ybarra's house, Jerry Lopez and Carlos Garibay picked them up in a blue four door car. (R.IV-415). The group decided to go to the Stop-n-Go on Crestway and O'Connor because Ybarra was hungry. (R.IV-415). On the way, Carlos Garibay showed

Appellant a black nine-millimeter pistol and asked him if he knew anyone that wanted to buy a gun. (R.IV-415). After looking at the gun, Appellant told Garibay that he did not know anyone interested in buying a gun and returned the gun to Garibay. (R.IV-415).

After the group went to the Stop-n-Go, Appellant stated that they dropped him back at home. (R.IV-416). Appellant also stated that he went inside the house, ate, talked to his sister, and then went to bed. (R.IV-416). He did not wake until 10:00 a.m. or 11:00 a.m. the next day. (R.IV-416).

Doctor Jan Garavaglia, a pathologist with the Bexar County Forensic Science Center, testified about the autopsy performed on Jerry Lopez. (R.IV- 419-425). Lopez suffered a gunshot wound to the face. (R.IV-429). The bullet entered the right cheek, skidded against the jaw bone, broke a tooth, passed through the tongue, severed the cartorid artery, and was recovered behind the left ear. (R.IV- 429-430). Profuse bleeding, as result of the severed artery, caused death. (R.IV-430). Dr. Garavaglia also stated that the gunshot wound showed powder tattooing which indicated that the gun was not more than about two feet from Lopez's face. (R.IV-427).

Richard Stengel, a firearms examiner, testified that the bullet recovered from Lopez's body, as well as the spent shell casing found in the car, were fired from the gun that was recovered and admitted as State's Exhibit No. 4. (R.IV- 457-462).

STATE'S RESPONSE TO APPELLANT'S POINT OF ERROR NUMBER ONE

Appellant's point of error number one is that the trial court erred in denying the Defendant's Motion for Directed Verdict because

the State had not presented sufficient evidence corroborating the testimony of the accomplice witness, Rudy Ybarra, as required by article 38.14 of the Texas Rules of Criminal Procedure. Said point of error is without merit.

A complaint on the overruling of a motion for directed verdict is, in actuality, an attack on the sufficiency of the evidence. See Cook v. State, 858 S.W.2d 467, 469-470 (Tex.Crim.App. 1993). When considering a challenge to the legal sufficiency of the evidence, an appellate court is to consider all of the evidence, both direct and circumstantial, in the light most favorable to the jury's verdict, and to determine whether, based on that evidence, any rational jury could have found all the essential elements of the offense beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979); Rodriguez v. State, 819 S.W.2d 871, 872 (Tex.Crim.App. 1991). However, in the instant case, Appellant focuses on the sufficiency of the evidence corroborating the testimony of the accomplice, Rudy Ybarra.

Article 38.14 of the Texas Code of Criminal Procedure states that a conviction cannot be had upon the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant with the offense committed. It further state's that the corroboration is not sufficient if it merely shows the commission of the offense. Tex.Code Crim. Proc. art. 38.14.

The test of whether the corroboration is sufficient is to eliminate from consideration the accomplice witness' testimony and then examine the remaining evidence to determine if it is of an

incriminating character tending to link the accused to the commission of the crime. See Reed v. State, 744 S.W.2d 112, 125 (Tex.Crim.App. 1988). However, it is not necessary that the evidence corroborating the accomplice witness testimony directly link the accused to the crime or be sufficient in itself to establish guilt. See Romero v. State, 716 S.W.2d 519, 523 (Tex.Crim.App. 1986). It is sufficient if the combined cumulative weight of the incriminating evidence furnished by non-accomplice witnesses tends to connect the accused with the commission of the offense. Id; citing Granger v. State, 683 S.W.2d 387 (Tex.Crim.App. 1984).

In applying the test of sufficiency of corroboration of accomplice testimony, each case must be considered on its own facts and circumstances. See Reed v. State, supra, 744 S.W.2d at 126. All facts, both direct and circumstantial, may be examined in ascertaining whether sufficient corroboration exists. Id.

In the instant case Rudy Ybarra testified that on October 20, 1994, he, Appellant, Carlos Garibay, and Jerry Lopez were in a blue four door Dodge. (R.III-32). Ybarra further testified that they followed a late model Cadillac onto Austin Highway and then onto Sheraton Drive. (R.III-61). Jerry Lopez turned off the headlights of the car as they followed the Cadillac onto Sheraton Drive. (R.III-62).

Ybarra stated that Appellant jumped out of the car with the nine-millimeter gun and snuck up to the couple that were exiting the Cadillac in their driveway. (R.III-63). Ybarra saw Appellant

pointing the gun sideways at the couple. (R.III-73). Ybarra then stated that he, Jerry Lopez, and Carlos Garibay saw a police car and decided to leave Appellant. (R.III 75-76). However, Appellant jumped back into the car with the gun and a lady's purse. (R.III-84).

Ybarra further testified that as Appellant jumped into the car, the gun went off striking Jerry Lopez in the neck. (R.III-86-87). Appellant then jumped out of the car and stated, "Y'all don't know me.". (R.III-87-88). Ybarra stated that as Appellant jumped out of the car the gun went off a second time but did not strike anyone. (R.III-89)

Taking Ybarra's testimony out, a review of the record reveals the following corroborative evidence. Diana Morehouse described the perpetrator as having a slender build and between five feet seven inches to five feet eight inches tall with olive colored skin. (R.III-157). She could not see his face because he was wearing something across it. (R.III-155). She further stated that he held the gun sideways at her and her husband and that she gave the perpetrator her purse. (R.III-155-157).

Jeffrey Morehouse also described the perpetrator as having a slender build but could not see his face. (R.III-177). He stated that the perpetrator jumped into the back of a four door vehicle which had three other people inside. (R.III-175). Mr. Morehouse then heard two gunshots as the car pulled away. (R.III-176). Mr. Morehouse later stated that Jerry Lopez was too big to have been the perpetrator. (R.III-178).

Officer Andres DeLeon testified that on October 20, 1994, at approximately 11:40 p.m. he saw a Cadillac being followed by a blue four door Dodge with its headlights off. (R.III-187-191). As he approached Sheraton Drive, Office DeLeon saw a young male running from the Morehouse's house. (R.III-192). He described the suspect as between five feet seven and five feet eight inches tall with a slender build. (R.III-194). Officer DeLeon described Rudy Ybarra as being a "good size young man" weighing between 280 to 300 pounds. (R.III-202). He described Carlos Garibay as being stout and between five feet ten and five feet eleven inches tall. (R.III-202). Jerry Lopez was also described as being between five feet ten and five feet eleven inches tall and weighing approximately 180 to 200 pounds. (R.III-203).

Appellant, in his statement to the police, admitted that he was with Rudy Ybarra, Jerry Lopez, and Carlos Garibay in a blue four door vehicle earlier on October 20, 1994. (R.IV-415). He also admitted to handling a nine-millimeter handgun but stated that he returned it to Carlos Garibay. (R.IV-415). Appellant stated that he went to a Stop-n-Go with the group but was dropped off at home right after. (R.IV-416).

In sum, the non-accomplice witnesses established that four individuals were in a four door blue Dodge. One of them robbed Mr. and Mrs. Morehouse. Jerry Lopez, Carlos Garibay, and Rudy Ybarra did not fit the description of the perpetrator given by Jeffrey and Diana Morehouse nor that given by Officer DeLeon. Moreover, Appellant's statement places him with Jerry Lopez, Carlos Garibay,

and Rudy Ybarra in a blue four door car on the night of the robbery.

The State, therefore, contends that the circumstantial evidence introduced from non-accomplice witnesses tends to connect the Appellant to the offense through his physical description and his own statement placing him with the group on the night of the offense. Moreover, the non-accomplice testimony corroborates much of the testimony given by Rudy Ybarra. In addition, the State contends that, weighing the evidence in the light most favorable to the jury's verdict, there was sufficient evidence for any rational jury to find that Appellant committed the offense beyond a reasonable doubt.

For these reasons, the State urges that Appellant's point of error number one should be overruled.

STATE'S RESPONSE TO APPELLANT'S POINT OF ERROR NUMBER TWO

Appellant's second point of error is that the trial court erred in admitting evidence of the extraneous offense of the killing of Jerry Lopez. Said point of error is unmeritorious.

In reviewing a trial court's decision to admit or exclude evidence, an appellate court uses an abuse of discretion standard. See Green v. State, 934 S.W.2d 92, 101-102 (Tex.Crim.App. 1996); citing Montgomery v. State, 810 S.W.2d 372, 379-380 (Tex.Crim.App. 1990). A reviewing court should not reverse a trial judge whose ruling is within the "zone of reasonable disagreement. Id.

Texas Rule of Criminal Evidence 404(b) states that evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity

therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. See Tex.R.Crim.Evid. 404(b).

The Rule 404(b) list of purposes for which extraneous offense evidence may be admissible is not exhaustive. See Banda v. State, 768 S.W.2d 294, 296 (Tex.Crim.App. 1989), cert. denied, _ U.S._, 110 S.Ct. 291, 107 L.Ed.2d 270 (1989). Evidence of extraneous offenses which are indivisibly connected to the charged offense and necessary to the State's case in proving the charged offense may be admissible as relevant evidence to explain the context of the offense for which the defendant is on trial. See Lockhart v. State, 847 S.W.2d 568, 571 (Tex.Crim.App. 1992) cert. denied 510 U.S. 849, 114 S.Ct. 146, 126 L.Ed.2d 108 (1993).

In the instant case, the shooting of Jerry Lopez occurred as the Appellant was getting into the getaway car after having robbed Mr. and Mrs. Morehouse. (R.III- 89, 176). The shooting was part of the continuing transaction that began when Appellant and his friends decided to rob someone and ended when three of the four suspects were apprehended on Austin Highway. In addition, the shooting was relevant to explain the eventual apprehension of three of the four suspects and the absence of the Appellant. In sum, the State contends that the extraneous act was indivisibly connected to the aggravated robbery and necessary to explain the context of that offense. As such, evidence of the extraneous act was far more probative than prejudicial.

Appellant also seems to asserts that the trial court did not apply the prejudicial versus probative value balancing test because it did not articulate it into the record. However, when ruling on the admissibility of evidence, the trial court implicitly makes findings of fact and conclusions of law. See Green v. State, 934 S.W.2d 92, 104 (Tex.Crim.App. 1996); citing McFarland v. State, 845 S.W.2d 824, 842 (Tex.Crim.App. 1992), cert denied, 508 U.S.963, 113 S.Ct. 2937, 124 L.Ed.2d 686 (1993). Where an appellant does not ask the court to make oral or written findings, the court is not mandated to sua sponte put these findings or conclusions on the record. Id; also citing Theus v. State, 845 S.W.2d 874, 880 n.6 (Tex.Crim.App. 1992).

In the instant case, the record reveals that Appellant did not ask the court to make oral or written findings of fact or conclusions of law on the Rule 403 analysis. (R.III-81-89). In the absence of such request the trial court was not mandated to articulate its analysis into the record. See McFarland v. State, supra, 845 S.W.2d at 842.

For the reasons stated above, the State urges that the trial court did not abuse its discretion in admitting evidence of the death of Jerry Lopez and Appellant's point of error number two should be overruled.

STATE'S RESPONSE TO APPELLANT'S POINT OF ERROR NUMBER THREE

Appellant's point of error number three is that the trial court erred in admitting the autopsy photograph of Jerry Lopez without

first applying a Rule 403 analysis and articulating it into the record. Said point of error is without merit.

Texas Rule of Criminal Evidence 403 states that although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. See Tex.R.Crim.Evid. 403. Relevant evidence is defined as evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Tex.R.Crim.Evid. 401. All relevant evidence is admissible, except as otherwise provided by constitution, statute, or rules pursuant to statutory authority. See Tex.R.Crim.Evid. 402.

The admissibility of a photograph is within the sound discretion of the trial court, which determines whether the exhibit serves a proper purpose in the enlightenment of the jury. Flores v. State, 906 S.W.2d 133, 142 (Tex.App.- San Antonio 1995, no pet.); citing Ramirez v. State, 815 S.W.2d 636, 646-647 (Tex.Crim.App. 1991). Photographs generally must have some probative value which is not outweighed by their inflammatory nature. Id.; citing Long v. State, 823 S.W.2d 259, 272 (Tex.Crim.App. 1991) cert. denied - U.S.-, 112 S.Ct. 3042, 120 L.Ed.2d 910 (1992). In determining the admissibility of photographs under Rule 403 of the Texas Rules of Criminal Evidence, the following factors are relevant for consideration: the number of exhibits offered, their gruesomeness, their detail, their size, whether they or black and white or in color, whether they are close-ups, whether the body is naked or

PUBLISHER'S NOTE:

Page number(s) 18 could not be located.

contends that the photograph was far more probative than prejudicial.

Appellant also asserts that the trial court erred because it did not apply a Rule 403 analysis and articulate it into the record. However, as noted in the State's Response to Appellant's Point of Error Number Two, when ruling on the admissibility of evidence, the trial court implicitly makes findings of fact and conclusions of law. See Green v. State, 934 S.W.2d 92, 104 (Tex.Crim.App. 1996); citing McFarland v. State, 845 S.W.2d 824, 842 (Tex.Crim.App. 1992), cert denied, 508 U.S.963, 113 S.Ct. 2937, 124 L.Ed.2d 686 (1993). Where an appellant does not ask the court to make oral or written findings, the court is not mandated to sua sponte put these findings or conclusions on the record. Id; also citing Theus v. State, 845 S.W.2d 874, 880 n.6 (Tex.Crim.App. 1992). In the instant case, the record reveals that Appellant did not request the trial court to articulate its findings into the record and, without such request, the trial court was not mandated to do so.

For the reasons stated above, the State urges that the autopsy photograph was properly admitted into evidence and Appellant's point of error number three should be overruled.

STATE'S RESPONSE TO APPELLANT'S POINT OF ERROR NUMBER FOUR

Appellant's point of error number four is that the trial court erred in admitting accomplice witness testimony of an earlier robbery attempt because the evidence did not fit within any of the exceptions to Rule 404(b). Said complaint is without merit.

Appellant's point of error number four refers to the testimony of Rudy Ybarra concerning the night of the offense. Specifically, Ybarra stated that he, along with Appellant, Jerry Lopez, and Carlos Garibay, followed a white pick-up truck into a neighborhood off of Marbach Street. (R.III-49-50). Ybarra testified that they had planned to rob the people and steal the rims from the truck. (R.III-49) However, the group did not "jack" the truck because the truck pulled into a driveway and the people went inside their home. (R.III-51).

Texas Rule of Criminal Evidence 404(b) lists exceptions where extraneous offense evidence may be admissible. See Tex.R.Crim.Evid. 404(b). However, this list is not exhaustive. See Banda v. State, 768 S.W.2d 294, 296 (Tex.Crim.App. 1989), cert. denied. _U.S._, 110 S.Ct. 291, 107 L.Ed.2d 270 (1989). Evidence of extraneous offenses which are indivisibly connected to the charged offense and necessary to the State's case in proving the charged offense may be admissible as relevant evidence to explain the context of the offense for which the defendant is on trial. See Lockhart v. State, 848 S.W.2d 568, 571 (Tex.Crim.App. 1992), cert. denied 510 U.S. 849, 114 S.Ct. 146, 126 L.Ed.2d 108 (1993).

In the instant case, Rudy Ybarra's testimony concerning the following of the white pick-up truck was a continuation of the story of what happened on the night of the offense. (R.III-45). Contrary to Appellant's assertions, no offense was committed by following the

truck.[1] However, the extraneous act was relevant and necessary to explain the events on the night of the offense. As such, the State contends that it was contextual evidence and thus admissible over Rule 404(b) and 403 objections.[2]

Appellant also seems to assert that the accomplice witness rule, embodied in article 38.14 of the Texas Code of Criminal Procedure, applies to extraneous acts. Specifically, Appellant complains that the only evidence of the extraneous act, following the truck, is the testimony of Rudy Ybarra, an accomplice, and that such evidence cannot prove the extraneous act beyond a reasonable doubt.

Article 38.14 of the Texas Code of Criminal Procedure states that a conviction cannot be had upon the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant with the offense committed. Tex.Code.Crim.Proc. 38.14. Whether this rule applies to extraneous acts is the issue at hand.

In Rice v. State, 605 S.W.2d 895 (Tex.Crim.App. 1980), the Court of Criminal Appeals left unsettled the issue of whether the accomplice witness rule applied to extraneous offenses. Two years later, the Thirteenth Court of Appeals, in Bustamante v. State, 653

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[1]Criminal Attempt, as defined in §15.01 of the Texas Penal Code, requires an act amounting to more than mere preparation that tends but fails to effect the commission of the offense intended.

[2]Appellant also asserts that the trial court failed to conduct a Rule 403 analysis and articulate into the record. As stated in the State's Response to Appellant's Points of Error Numbers Two and Three, Appellant failed to request the trial court to articulate its findings of fact into the record. In the absence of such request, the trial court is not mandated to do so. See Green v. State, 934 S.W.2d 92, 104 (Tex.Crim.App. 1996).

S.W.2d 846 (Tex.App.- Houston [13 Dist] 1982) pet. dism'd 702 S.W.2d 193 (Tex.Crim.App. 1985), held that the accomplice witness rule did indeed apply to extraneous offenses. In doing so, the Court in Bustamante relied on the 1931 case of Wells v. State, 118 Tex.Cr.R. 355, 42 S.W.2d 607 (Tex.Crim.App. 1931), and the minority opinion in Rice v. State. The State now challenges the validity of this holding in light of Holloday v. State, 709 S.W.2d 194 (Tex.Crim.App. 1986).

Holloday v. State, and the line of cases that have followed, holds that article 38.14 of the Texas Code of Criminal Procedure does not require that the offense which elevates murder to capital murder be corroborated by independent evidence. Holloday v. State, supra, 709 S.W.2d at 196-199; see also Romero v. State, 716 S.W.2d 519, 520 (Tex.Crim.App. 1986). It, therefore, seems inconsistent and illogical to hold that article 38.14 does not apply to the elevating offense of a capital murder but does apply to extraneous acts, which are not part of the primary offense. Accordingly, the State urges that the accomplice witness rule, codified in article 38.14 of the Texas Code of Criminal Procedure, should not apply to extraneous acts. Consequently, Appellant's point of error number four should be overruled because the extraneous act was contextual evidence and proved by the testimony of Rudy Ybarra.

In the alternative, the State contends that any error, if indeed there was error, in admitting the extraneous act without corroboration from non-accomplice witnesses was harmless.

Rule 81(b)(2) of the Texas Rules of Appellate Procedure requires an appellate court to focus upon the error and determine whether it contributed to the conviction. See Harris v. State, 790 S.W.2d 568, 585 (Tex.Crim.App. 1989); see also Tex.R.App.P. 81(b)(2). The impact of the error cannot be properly evaluated without examining its interaction with the other evidence. Harris v. State, supra, 790 S.W.2d at 586.

A review of the record, as summarized in the State's Statement of Facts, reveals that the State presented enough evidence that any rational trier of fact would have reached the same result if the evidence of the extraneous act of following a truck had not been admitted. The State urges that beyond a reasonable doubt any error in admitting the extraneous act was harmless and did not contribute to Appellant's conviction. Accordingly, Appellant's point of error number four should be overruled.

CONCLUSION

WHEREFORE, PREMISES CONSIDERED, the State submits that the action of the trial court should in all things be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, RODERICK B. GLASS, Assistant Criminal District Attorney, Bexar County, Texas, certify that a copy of the foregoing brief was mailed to SUZANNE KRAMER and JOHN FAHLE, Attorneys for Appellant, 127 Lewis Street, San Antonio, Texas 78205, on this the 1st day of April, 1997.

RODERICK B. GLASS

IN THE

DISTRICT COURT OF BEXAR COUNTY, TEXAS

227TH JUDICIAL DISTRICT

THE STATE OF TEXAS,		
Plaintiff		
VS.		NO. 95-CR-0391
BRUCE FERNANEZ,		
Defendant		

STATEMENT OF FACTS

VOLUME VII OF VII VOLUMES

COPY

VOLUNTARY STATEMENT

DATE November 1, 1994, 19____. TIME 1345 hrs M. PLACE Bexar County SO CID

I, Bruce Lee Fernandez, am 18 years old and I live at 6435 Crestway Dr #134 San San Antonio, Texas, County of Bexar

I am giving this statement to Det/Sgt Donald F. Davis I.D. 221, who has identified himself as a Detective Sergeant assigned to Criminal Investigations, Terrell Hills P.D. and he has duly warned me that I have the following rights: that I have the right to remain silent and not make any statement at all; that any statement I make may be used against me at my trial; that any statement I make may be used as evidence against me in court; that I have the right to have a lawyer present to advise me prior to and during any questioning; that if I am unable to employ a lawyer, I have the right to have a lawyer appointed to advise me prior to and during any questioning and that I have the right to terminate the interview at any time.

Prior to and during the making of the statement, I have and do hereby knowingly, intelligently, and voluntarily waive the above explained rights and I do make the following voluntary statement to the aforementioned person of my own free will and without any promises or offers of leniency or favors, and without compulsion or persuasion by any person or persons whomsoever:

About 7:45-8:00 pm, Thursday October 20, 1994 Jerry Lopez and Carlos Garibay picked up myself and Rodolpho Ybarra where I live. I got in the car behind the driver and we started driving around. After a few minutes, I fell asleep in the car. When I awoke Tony and Carlos were nudeing me and I was still doped up on marijuanna and beer. After I got up Jerry said "Mickey look, there's these two people, get out and rob them". Carlos said something about it being dark and to get out and do it and be quick. They also said it's dark, they'll never see you. Jerry had stopped the car about 10-15 feet away from the corner of Sheraton and Austin Hwy. I got out, ran around the bushes, into the garage I said something to them about "give me your money or give me you shit" or something along those lines. The guy hesitated a little, reached into his pocket with one of his hands and then handed me a gold clip with some money. I received it, I don't remember if I put it in my pocket or had it in my hand. I saw the lady and saw her purse. I asked for her purse. I don't remember if I looked through it there or if I kept it and kept on running. I ran down the driveway to where they had dropped me off and I noticed that it was a different car. After I ntoiced that, I ran down Sheraton, away from Austin Highway. I'm not sure if I ran on the grass or the raod. I noticed Jerry coming in the car towards Sheraton on Morningside, I think, I'm not sure. He slowed down, I don't know if it was for a stop sign of for me to get in. I opened the passenger, backside door, noticed that Tony was still sitting there as I went to enter the door and enter the car, Jerry had given the car a little bit of gas, I still had my left foot out on the Cement. When he gave the car some gas, I slipped, had the gun pointing into the car and while I slipped I forgot I had the gun and naturally gripped with my hands which set the gun off. I thought it had hit the roof of the car. I jumped in on Tony's lap and Jerry started to give the car some gas I figured he was still OK. He made a right onto Sheraton, he proceeded to Sheraton and Austin Hwy. When we got there the lights from the street lamps went into the car and Carlos noticed that Jerry was bleeding from the mouth. That point, Jerry gave the car a little bit of gas turning right onto Austin Hwy. That point he stopped giving the car gas, the car stopped movi Carols noticed that Jerry was bleeding and I looked at Jerry and noticed he had his hand up to his mouth and was hunched over, kind of like vommiting. Carlos said "you shot Jerry, get out the car". Tony opened his door, I was still on his lap and I was pushed out the car

----------cont,d page two----------

I have read this statement consisting of 2 (Two) page(s), each page of which bears my signature, and I do affirm that all facts and statements contained herein are true and correct.

Bruce Fernandez
Signature of person making voluntary statement

[redacted]
Witness

The above warnings were given by and this voluntary statement was taken by

Det/Sgt D.F. Davis #221
(This must be one and the same person as named above)

STATEMENT OF: Fernandez, Bruce Lee

BF

Tony is the one that pushed me out of the car. As I was falling, I went to put my hands down and ended up clutching my fist again, setting the gun off a second time. After it went off I got scared and let go of it. It fell and I didn't notice where it fell and I just ran across Austin Hwy. I was near a building that had like utility trucks and a big water tower. I ran down some allley behind some houses. At the end of the alley I made a right ran down about two or three blocks and then hopped a fence and stayed there, slept for I don't know how long. I got up and it was still dark and people were starting to drive cars and I noticed that lights were starting to come on in the neighborhood. I hopped the fence again to the street, casually walked to the corner, I had no idea where I was at. I noticed a few cars and went back and hopped the fence, waited a few minuets and then I heard a bus I hopped the fence and went to teh corner again and the bus was going down Broadway so I didn't catch it. I sat at the corner waited a few minutes and I saw two gentlemen going to the bus stop away from Broadway. I crossed Austin Hwy, went to the bus stop where the gentlemen were and asked when the bus was going to be passing by. The gentlemen said, just about three minutes I reached in my pocket to make sure I had some change and when the bus came I got on it. As I was on the bus I started noticeing that I was on Austin Hwy, then we passed the Bun and Barrell and I knew I was on Austin Hwy. The bus went to Austin Hwy and Perrin Beitel and made a left I got off at the first stop at the Stop-N-Go. I checked for some more change and went across the street and took 614 bus going to the Randolph park and ride. I asked for a transfer and took the 632 or 639 and got off at the HEB on Walzem and Montgomery Rd and walked home. I got home still a little dark outside. I got in quietly and went to my sisters room and fell asleep next to her. I don't know what happened to any of the stuff that I got from the people that I robbed. That's it, that's everything. BF----------NFE----------

Bruce Fernandez

IN THE

DISTRICT COURT OF BEXAR COUNTY, TEXAS

227TH JUDICIAL DISTRICT

THE STATE OF TEXAS,		
Plaintiff		
VS.		NO. 95-CR-0391
BRUCE FERNANDEZ,		
Defendant		

STATEMENT OF FACTS

VOLUME III OF VOLUMES

APPEARANCES:

FOR THE STATE: MR. A.J. DIMALINE and
MS. LAURA PARKER
Assistant District Attorneys
Bexar County Justice Center
San Antonio, Texas 78205

FOR THE DEFENDANT: MS. SUZANNE KRAMER and
MR. JOHN FAHLE
Attorneys at law
127 Lewis St.
San Antonio, Texas 78212-5818

-o0o-

BE IT REMEMBERED that the above-styled and numbered cause came on to be heard beginning on the 29th day of November, 1995, before the HON . MIKE M. MACHADO, Judge of the 227th Judicial District of Texas, at San Antonio, Texas.

COPY

RANDALL E. SIMPSON, CSR

THE COURT: What says the State?

MS. PARKER: We have reasons for each and every strike that we made. I'd be happy to read them into the record. I'd also like the Court to take judicial notice that there are, I believe, five Hispanics on the jury itself at this point. The State only took six strikes instead of the ten that we are entitled to. Two of those were double strikes with the defense. And if you'd like, I can give you the reasons for the other strikes, but I don't feel that we violated Batson in any way.

THE COURT: Do you want to put the reasons in there? If you wish.

MS. PARKER: Okay. Our first strike was on Thelma Mena, juror number five. She seemed not to care about following the law. She seemed lethargic and was a little bit argumentative.

MR. FAHLE: Your Honor, I'm sorry. I apologize. Has the Court then ruled that we have met our initial --

THE COURT: No, you haven't.

MR. FAHLE: Okay. May I put into the

record a couple of things? If we haven't met the initial burden, I don't see any reason for them to put their reasons into the record. If we have, on the other hand, then they have to put sworn testimony into the record. But I would like to put a couple of things into evidence.

THE COURT: Go ahead. I ruled against your motion.

MR. FAHLE: Thank you, Your Honor. I would move and enter into evidence - I don't know if we have another copy of this - the clerk's copy of the jury list, including the State's strikes and the defense strikes, and then the final clerk's copy.

THE COURT: I counted six Hispanics, number 32, juror number nine.

MS. PARKER: Okay.

THE COURT: Go ahead. One black.

(Marked Defendant's Exhibit Nos. 1 through 3 for identification.)

MR. FAHLE: Judge, Defendant's Exhibit 1 is the clerk's copy of the entire jury list, including the jurors' cards, information cards.

Defendant's Exhibit 2 is the Court's copy - sorry - the clerk's copy of the State's strikes. And Defendant's Exhibit 3 is the clerk's copy of defense strikes. I'll tender these to opposing counsel.

MR. DIMALINE: We don't have any objection.

MR. FAHLE: We move Defendant's Exhibits 1, 2 and 3 admitted for purposes of this hearing, Your Honor.

THE COURT: Motion will be granted. Defendant's Exhibit 1, 2 and 3 will be admitted for the purpose of the Batson hearing.

MR. FAHLE: Thank you, Your Honor. Then the other thing I'd like to ask the Court to take notice of - and we talked about this yesterday to some extent - but the final composition of the entire venire, the racial composition of the entire venire, I count 11 white males, ten white females, nine Hispanic males, nine Hispanic females, three black females. And then of the venire after strikes for cause, I count nine white males, four white females, five Hispanic males, seven Hispanic females, and three black females. The Court has

already taken judicial notice yesterday of the race of the State's strikes.

THE COURT: I want you to know Hispanic males are white. You understand that?

MR. FAHLE: I'm sorry?

THE COURT: Hispanics are white.

MR. FAHLE: I'm apologize, Your Honor. When I said white, I should have referred, let me change that to Caucasian.

THE COURT: If you're talking about ethnics, that's different now; but you say so many white, so many Hispanics. Hispanics are white; do you understand that?

MR. FAHLE: I apologize, Your Honor. If I could rephrase that. Replace the word white with Caucasian.

THE COURT: That's better.

MR. FAHLE: Thank you.

THE COURT: Caucasian. Hispanic males are Caucasian. Male or females.

MR. FAHLE: I'm sorry?

THE COURT: If you're going to refer to ethnic groups say so many so-called white or ethnic group, German, Irish, English, Scots, so many white or Hispanic. So many --

MR. FAHLE: Let me try and rephrase one more time, Your Honor. Every time I said white male, let's replace that with Anglo-Saxon.

THE COURT: Anglo. That's different.

MR. FAHLE: I apologize for that misunderstanding. So, and then every time I refer to Hispanic males, Hispanic females, I was referring to the ethnic background. That was all I had on the Batson motion, Your Honor. If the Court is ruling that we have not reached our prima facie burden.

THE COURT: Right.

MR. FAHLE: Is that still the Court's ruling?

THE COURT: Yes. Okay. Call Lillian. I'm going to bring the panel in. We'll swear them in.

(Thereupon the jury returned to the courtroom.)

THE COURT: Please have a seat. Good morning. Remember that you're the sole and exclusive judge of the facts that will come to you from this witness stand, and the credibility of the witnesses. I cannot make any comment as to the facts. I'll be taking notes down.

They'll be bringing me papers to sign and they'll be signed, but I'm listening all the time. I trained myself to do that.

There will be times where there will be an objection made and we're going to discuss it outside your presence, so we take you back to the jury room. A lot of the times we'll settle the matter right then and there and we'll send the bailiff to get you back here. If one of you is in the restroom or not ready, you tell the bailiff you're not ready and we'll wait for you. Please. In the past, my experience has been it's embarrassing for 11 jurors to sit there waiting for that 12th juror. From that door to that vacant seat is a long way for that 12th juror.

A lot of times we take you out and as soon as we take you out, we settle the question and bring you back; you barely sit down when there's another question and we take you out. Bear with us. Be positive. It's good for your circulation to get up and sit.

When you come in, it's not necessary that you sit in the same chair. Just walk in, file in, sit in the front row, sit in the last

row. It's nice and it will kill the monotony if you look at the witness stand from different angles.

Everything is formality here and according to procedure. You'll be sworn in and the State will make an opening statement, and the defense will make an opening statement. What the attorneys say to you is not evidence. It's not evidence unless the attorneys take the oath of a witness and take the witness stand. At this time, if you'll stand, Ms. Cronk will administer the oath of a juror. Please stand and raise your right hand.

(Thereupon the jury was sworn.)

THE COURT: Please have a seat. Do you have the indictment? At this time the indictment will be read and the Defendant will enter his plea. Remember, the indictment is no evidence at all. No evidence at all.

(Thereupon the indictment was read to the jury by Mr. Dimaline.)

MR. DIMALINE: Should I proceeded to the second count?

THE COURT: You may.

(Thereupon, count two of the indictment was read to the jury by Mr. Dimaline.)

THE COURT: Will you stand, Mr. Fernandez, and enter your plea?

THE DEFENDANT: Not guilty, Your Honor.

THE COURT: Thank you. You may have a seat. At this time the State, do we have any witnesses in the courtroom? Please bring them up here. I want to invoke the rule. Any witnesses in this case? Any witnesses?

MR. DIMALINE: There's one in the back room, Judge.

THE COURT: Well, keep him out there.

MR. DIMALINE: That's all we have.

MS. KRAMER: Your Honor, we have some possible punishment witnesses.

THE COURT: The minute they walk through that door, you let me know.

MS. KRAMER: They're here.

THE COURT: Well, bring them up here. Bring all witnesses. State and defense witnesses. I'm putting both parties on notice,

the State and defense, if any witnesses walk into this courtroom, let me know and I'll place them under the rule. If they don't, they'll be disqualified. The Court has invoked the rule. That means you'll have a seat outside the courtroom. You'll not witness nor hear the testimony of the other witnesses. You will not discuss the case among yourselves. You're not to discuss your testimony. You may discuss it with the State and defense attorneys.

(Thereupon the witnesses were sworn by the Court.)

THE COURT: Please have a seat out in the hall. Don't walk into the courtroom. There will be other witnesses. As soon as they walk in, you let me know. Rick, anybody that passes through that door, inquire whether or not they're witnesses. Okay. At this time we'll have opening statements. This is not evidence at all. It's just what they hope to prove.

MS. PARKER: May I proceed? Good morning, ladies and gentlemen. This is a case about four young men who went out searching for a victim. And the evidence is going to show that on October 20th of last year, those victims

were Jeff and Diana Morehouse. You are going to find out that this Defendant, Bruce Fernandez, was with his three friends. He was with Jerry Lopez, Carlos Garibay and Rudy Ybarra. And that was Rudy Ybarra that just came in here and got sworn.

They got together about 9:00 o'clock on that day and they went riding around in Jerry Lopez's mother's car. They went riding around looking for somebody to jack. Do you all know what that means? That means they were looking around for somebody to rob, somebody to stick up. They drive around, they drive around.

About midnight, they were driving up Broadway in the Alamo Heights area, and they see a nice new Cadillac. And they get in behind that car and they follow it up Broadway, and they follow it up Austin Highway; they cross North New Braunfels; they get to a little street called Sheraton. And the Cadillac pulls in on Sheraton. They turn off their headlights and they pull in behind this Cadillac going into Terrell Hills, heading home. Jeff and Diana Morehouse pull into their garage, which is on the corner of Sheraton and Morningside, and when

they get out of their car, Bruce Fernandez jumps out with a gun that Carlos Garibay had given him earlier that night, and runs up to them in their driveway, in their garage. He has on a mask, a bandanna over his face, a hat pulled down over his eyes, and he puts the gun on them like this. A semi-automatic weapon. And says, "Give me your money." And tells Mrs. Morehouse, "Give me your purse." And he takes their stuff. He takes their money, he takes her purse.

Meanwhile, Jerry Lopez, the driver of the car, along with Carlos Garibay and Rudy Ybarra, go around the corner, turn around and come back so they can pick up Bruce Fernandez, their friend, their accomplice. As they're driving back by the Morehouse's house, Bruce Fernandez is jumping into the car.

MS. KRAMER: Your Honor, I'm sorry. I hate to object during opening statements, but we would object to what they're about to go into on 404(b).

MS. PARKER: Your Honor, you already ruled that it was going to be admissible during the opening statement.

THE COURT: Objection overruled. It's

not evidence, members of the jury.

MR. FAHLE: You ruled on a Motion in Limine. I'm simply preserving that.

THE COURT: Objection overruled.

MS. PARKER: As the car is passing back by the Morehouse's driveway, Bruce Fernandez runs out there, gun in his hand, carrying the purse and everything. When he jumps in the car, the gun accidentally goes off and it shoots Jerry Lopez in the head.

They pull up to the next stop sign. Bruce decides he's going to bail out. He knows there's big trouble. They've just seen a police car go by. So he jumps out. The gun goes off again. And he flees and throws the gun down right there and takes off.

Jerry Lopez is able to keep on driving a little bit. He gets out in the middle of Austin Highway. Carlos Garibay, who's riding in the front seat helps him get the car pulled over to the side. Rudy Ybarra is in the back. Jerry Lopez gets out of the car and proceeds to bleed to death in the middle of the street.

Carlos Garibay, Rudy Ybarra, they don't know what to do. They see a cop down the

street and they call him. They make up a story about how they were just car jacked and their friend got shot. Then the Terrell Hills police show up. In the meantime, the Morehouses called the police, and they tell the cop that was out on Austin Highway that these guys are suspects in a robbery, and they get arrested.

Bruce Fernandez, this Defendant, who ran off after shooting his friend in the head, is caught a day or two later and arrested.

MR. FAHLE: Your Honor, I'm sorry. Again we have to object both on 404(b) grounds, and rule 403 grounds. It's more prejudicial than probative them going into and continuing to go into this death that has nothing to do with the offense charged.

THE COURT: Objection overruled.

MS. PARKER: This case is about Bruce Fernandez and what he did that night. I can't think of anything more scary than to be driving up to your own house without a care in the world and have someone jump out and point a gun at your head, and that's why we're here today.

THE COURT: Members of the jury, this is not evidence. Please remember that. It's

very important. This is what they hope to prove. You consider evidence after the witness takes the witness stand. Defense?

MS. KRAMER: May I proceed, Your Honor?

THE COURT: You may. Defense attorney will make an opening statement.

MS. KRAMER: Good morning, ladies and gentlemen. Just to remind you of my name, I'm Suzanne Kramer. You didn't hear me say a word yesterday and I'm sure you've forgotten my name by now.

As you can imagine, in every situation there's always going to be two sides to every story. The State has their side; we have our side. You're going to have an opportunity to hear the different sides of the story.

Just initially, I would like to point this out. All throughout this whole trial, the State is going to come over here and they're going to stick their fingers in his face.

MS. PARKER: Your Honor, I'm going to object. That's argumentative. This is opening statement.

THE COURT: Sustain the objection.

Make an opening statement, not an argument.

MS. KRAMER: Thank you, Your Honor.

There are going to be several witnesses that the State is going to call. One of the State's witnesses that we anticipate that they're going to call has already pled guilty to this crime of robbery. He was at the scene of the crime. So when he is up on the witness stand, if they call him, we would ask you to please judge his credibility as you would judge any other witness as to why he might have a reason to be testifying against my client.

We hope to show you by the end of this trial that not only is my client, Bruce Fernandez, not guilty of this crime; but that Mr. Ybarra, possibly one of the other people that were present at the scene, are guilty of this crime, and they're just trying to take the heat off of themselves. They're trying to put the blame on Mr. Fernandez.

Finally, I don't want to keep you too long, at the end of all of this when you hear Mr. Ybarra's testimony, if you could please ask yourself when you're listening to his testimony and you go back to deliberate, is this the kind

of testimony that you could rely upon in deliberating upon the most important of your own affairs when you get to thinking about the reasonable doubt in this case. We ask that of you very strongly. That is your duty as jurors, and you took an oath to do that. Thank you.

THE COURT: Remember, members of the jury, this is not evidence; it's what they hope to prove. Okay. Who's the first witness?

MR. DIMALINE: The State calls Rudy Ybarra.

THE COURT: Rudy Ybarra.

* * * * * *

RUDOLFO ANTONIO YBARRA,

The witness, after having first been cautioned and duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

THE COURT: Your witness.

MR. DIMALINE: Thank you.

DIRECT EXAMINATION

BY MR. DIMALINE:

Q. Sir, can you please tell us your full name?

A. Rudolfo Antonio Ybarra.

Q. Okay. You're going to need to speak up so

we can all hear you. All right?

A. Rudolfo Antonio Ybarra.

Q. Can you spell your last name for the Court reporter?

A. Y-B-A-R-R-A.

Q. Do you have a nickname that you also go by?

A. Tony.

Q. Okay. Fat Tony?

THE COURT: What was it?

THE WITNESS: Tony.

Q. (By Mr. Dimaline) Are you also known as Fat Tony?

A. No. Huh-uh.

Q. Nobody has ever called you that before?

A. Mickey's mom and Carlos.

Q. Okay. How old are you, Rudy?

A. Eighteen.

Q. What do you do right now?

A. Right now I'm pursuing my GED.

Q. Did you go to high school at one point?

A. Yes, I did.

Q. What high school did you attend?

A. Roosevelt High School.

Q. Did you drop out at some point?

A. Yes, sir.

Q. When did you drop out?

A. In September.

Q. Of this year?

A. Yes, sir.

Q. What grade were you in?

A. It was the 11th.

Q. So you were a junior?

A. Yes, sir.

Q. And you're attempting to get your GED right now?

A. Yes, sir.

Q. Okay. Do you have a job?

A. No, sir. Not at the moment.

THE COURT: Can you all hear him?

A JUROR: He needs to speak up just a little bit.

THE COURT: They're having problems, son. Can you get closer to the microphone?

MR. DIMALINE: May I proceed?

THE COURT: You may.

Q. (By Mr. Dimaline) Rudy, I want to ask you about some people and how you know these people. Do you know a person named Jerry Lopez?

A. I knew him through middle school, because

we used to play football out in the field.

Q. So how long had you known Jerry Lopez?

A. Since I was in middle school. So it was like --

Q. Was he a friend of yours?

A. Yeah. Sort of, because we would always play football. That's the only way I really knew him.

Q. Okay. Did he go to high school with you?

A. Yeah. He was in a higher grade than me. When I was in the sixth grade, he was like in eighth grade. I knew him in middle school for about a year and I saw him when I went to high school.

Q. Did he go to Roosevelt also?

A. I think so.

Q. Okay. What about Carlos Garibay; do you know him?

A. Yeah. I've seen him around high school.

Q. Where did he go to school?

A. I think he went to Roosevelt.

Q. How did you know Carlos Garibay?

A. I'd see him around school, but I didn't really meet him until - didn't get to know him until last year.

Q. Last year? What about a person named Bruce Fernandez?

A. Yeah. I met Bruce about a year or two ago.

Q. A year or two ago. Do you see Bruce Fernandez here in the courtroom today?

A. Yes, sir.

Q. Can you please point to him and tell us what he's wearing?

A. He's wearing a tuxedo with, like a grayish-black tuxedo with like a gray tie.

Q. Is he sitting at the table next to me?

A. Yes, sir.

MR. DIMALINE: Your Honor, for the record, the witness has identified the Defendant.

THE COURT: Let the record so reflect.

Q. (By Mr. Dimaline) How do you know Bruce Fernandez?

A. I met him through another friend.

Q. You met him through a friend?

A. Yes.

Q. Would you all used to hang out together?

A. Yes.

Q. Does Bruce Fernandez have a nickname that you called him by?

MR. FAHLE: Your Honor, I'm sorry.

Could we approach on that?

(Discussion at the bench.)

MR. FAHLE: Your Honor, under 404(b), obviously any nickname anyone goes by, but especially the Defendant, might be construed by the jury that there's some sort of gang involvement. The State has not given notice that they intend to prove up any kind of gang involvement and, therefore, I don't think that they're entitled to go into that. Obviously, by the way, under 403 it's more prejudicial than probative.

MR. DIMALINE: His mother calls him Mickey, and there's no intention by the State of talking about any gang involvement.

MR. FAHLE: Withdrew that objection.

THE COURT: Withdraw the objection.

(Back before the jury.)

THE COURT: Son, when you're testifying, those are the 12 judges; not me, but them. Address it to them, please. It's not a conversation between you and the attorneys. It's the jury that's going to be the judges.

THE WITNESS: Okay.

Q. (By Mr. Dimaline) What's the name that

you, or everybody would call Bruce Fernandez?

A. Mickey.

Q. Mickey?

A. Yes, sir.

Q. Do you feel more comfortable talking about him using Mickey or Bruce?

A. It don't really matter. I usually call him both.

Q. Okay. For the jury's benefit, let's call him Bruce so they'll know who you're talking about; okay?

A. Okay.

Q. Rudy, I want to take you back to October the 20th of last year, 1994. Do you remember that day specifically?

A. Yes, sir.

Q. What were you doing on that day? Were you in school?

A. Yes, sir.

Q. And you were attending Roosevelt High School?

A. Yes, sir.

Q. What time did you get out of school that day?

A. It was around 12:45, 12:50. Somewhere

around there.

Q. Why did you get out at that time? Why weren't you going for the full day?

A. Because I was on a school work program.

Q. So you had a job somewhere?

A. Yes.

Q. Okay. What did you do when you got out of school that day?

A. I was waiting for the bus to go home.

Q. Okay. Is that the bus stop on Walzem Road right outside of Roosevelt?

A. Yes.

Q. Did somebody drive by while you were waiting for the bus there on Walzem Road?

A. Yes.

MR. FAHLE: Your Honor, I'm sorry. We've sat here for about nine questions now, leading questions. I didn't mind it on background, but --

THE COURT: Sustain the objection. Don't lead your witness.

Q. (By Mr. Dimaline) Who drove by while you were at the bus stop?

MR. FAHLE: Your Honor, again, that suggests that somebody did drive by. He hasn't

testified to that. I would again ask that he be directed not to lead his witness.

THE COURT: Objection overruled.

Q. (By Mr. Dimaline) You can answer that question.

THE COURT: You can answer.

THE WITNESS: Bruce.

Q. (By Mr. Dimaline) Bruce?

A. Yes.

THE COURT: Speak up, son. You're dropping your voice. There's 12 judges there facing you.

Q. (By Mr. Dimaline) What type of vehicle was Bruce driving?

A. Like a tannish brown van.

Q. Did you know whose van that was?

A. Yes, sir.

Q. Whose was it?

A. His mom's.

Q. Had you ever been in that van before?

A. Yes, I have.

Q. Okay. Did Bruce Fernandez pick you up in that van?

A. Yes, he did.

MR. FAHLE: Your Honor, again, that's

a leading question.

THE COURT: Don't lead your witness. Sustain the objection.

Q. (By Mr. Dimaline) Where did you go with Bruce?

A. We went to go help out a friend of his move.

Q. Who was that?

A. I don't recall his name.

Q. Where did you go after that?

A. After that, we went to Taco Bell to go get something to eat.

Q. Did you get something to eat at Taco Bell?

A. Yes, we did.

Q. What did you all decide to do after that?

A. We went over by his, I think it was his girlfriend's house to see if she needed a ride to work.

Q. Who was his girlfriend at that time?

A. I don't remember her name.

Q. Okay. Did you give her a ride to work?

A. No.

MR. FAHLE: Your Honor, once again that's a leading question.

THE COURT: Sustain the objection.

Don't lead your witness.

MR. FAHLE: Your Honor, I'd also ask that the -- I'm afraid the answer got out before I could stop him. I'd ask that the jury be instructed to disregard that answer.

THE COURT: Members of the jury, that was a leading question. Disregard it and disregard the answer from the witness.

MR. FAHLE: As the law requires, Your Honor, I move for a mistrial.

THE COURT: I beg your pardon?

MR. FAHLE: As the law requires, I will move for a mistrial.

THE COURT: Denied.

Q. (By Mr. Dimaline) Where did you go after that?

A. After that, I went back to Mickey's house.

Q. Mickey's house? Where did Mickey live at that point?

A. In a trailer park off of Crestway.

Q. Again, when you're talking about Mickey, who are you talking about?

A. Bruce.

Q. What happened over there at the trailer park?

A. We were there for a while. And then after that, we took off and we went by Carlos Garibay's house.

Q. When you say we, who are you talking about?

A. Me and Bruce.

Q. Where did you go at that point when you left?

A. We went to where Carlos was at.

Q. Carlos? Carlos Garibay?

A. Yes.

Q. Where was Carlos Garibay at?

A. In a street, in The Glen subdivision.

Q. In The Glen?

A. In The Glen.

Q. Okay. Was that close to where you were before or not?

A. Yeah. Right close by.

Q. What was the purpose of you going over to where Carlos was?

A. Bruce was talking to Carlos about something. I don't know what it was.

Q. Okay. Did you go to Carlos Garibay's house?

A. His house? We went -- No, not his house.

It was, I think, his girlfriend's house.

Q. Okay. Did you go over there?

A. Yes, we did.

Q. What happened over there?

A. Bruce and Carlos were just talking.

Q. Okay. What was Bruce talking about?

A. I don't know.

Q. Do you remember?

A. No. I don't remember what they were talking about.

Q. What happened over there?

A. Nothing. They were just talking, and then we left.

Q. Where did you go?

A. We went out to Fredericksburg Road, to that H.E.B. Central Recruiting Office.

Q. Why did you go out there?

A. To go apply for a job.

Q. Do you remember what time it was about that time?

A. Around 5:30 or 6:00.

Q. Okay. Did you leave the recruiting office?

A. Yeah. We left there.

Q. Where did you go after that?

A. To another friend's house.
Q. Do you know who that is?
A. Yes, I do.
Q. Who is that?
A. Leo Martinez.
Q. What did you all do over there?
A. We went by to visit him.
Q. Was Jerry with you at that point?
A. No.
Q. Did you ever meet up with Jerry that day?
A. We met up with Jerry and Carlos at Bruce's house later on in the day.
Q. What time was that, that you met up with Jerry and Carlos?
A. Like around 9:00 or 9:30.
Q. In the evening?
A. Yes.
Q. Where was that again that you met up with them?
A. At Bruce's house.
Q. What happened over there? What were you all doing?
A. We just got in the car and we left.
Q. I'm sorry?
A. Me and Bruce, what were we doing?

Q. What was everybody doing?

A. Oh, everybody? Well, before they pulled up, me and Bruce were just out there talking. And then that's when they pulled up. We just got in the car and left.

Q. What were you all talking about?

A. We were just --

MR. FAHLE: Your Honor, object on hearsay grounds. I have no problem with the Defendant's statements, but the witness' own out-of-court statements are hearsay.

THE COURT: The objection is overruled. You may answer the question.

Q. (By Mr. Dimaline) Was Bruce talking at that point?

A. We were just out there talking, me and him.

Q. What were you talking about?

A. We were just goofing around, talking about girls and other stuff.

Q. Okay. What happened when Jerry and Carlos showed up?

A. We just got in the car and left.

Q. Okay. You got in the car?

A. Yes.

Q. What kind of a car was it?

A. It was like a bluish Dodge Dynasty, I think.

Q. What color blue was it?

A. Like a lighter color blue, I think.

Q. Whose car was that?

A. I think it was Jerry's mom's car.

Q. Okay. Who all got in Jerry's mom's car?

A. It was me and Bruce and Carlos.

Q. Who was driving?

A. Jerry.

Q. Who was sitting in the front?

A. Carlos.

Q. Where were you and Bruce?

A. Bruce was behind Jerry, and I was behind Carlos.

Q. What were you all doing at that point? Where did you go?

A. We started driving around down 281. And then Bruce and Carlos were all - they started talking about jacking.

Q. Okay.

MR. DIMALINE: Your Honor, may we approach the bench?

THE COURT: You may.

(Conference at the bench.)

MR. DIMALINE: I didn't want to violate the Court's ruling on the motion, and I intend to elicit some answers as to what they were doing following other cars around, looking for other cars to jack. We gave 404(b) notice, and you instructed us that if we need to have a hearing outside the presence of the jury.

THE COURT: Do you want me to take the jury out?

MR. DIMALINE: I'm just giving them notice that that's what I'm intending to do at this point.

MR. FAHLE: Well, Your Honor, I think they're required - it's not our decision whether or not to take the jury out. If they want to use the evidence, that's fine with us.

MR. DIMALINE: We think it's admissible. I'm just --

MR. FAHLE: As long as we first have a hearing outside the presence of the jury.

THE COURT: Take the jury out, please.

(Thereupon the jury was removed from the courtroom.)

THE COURT: Okay. Go ahead and ask

the question you were going to ask. The jury is out.

MR. DIMALINE: Okay.

Q. (By Mr. Dimaline) Rudy, what was going on when you all were driving around? What were you doing?

A. Well, we were cruising. Then they started talking about jacking.

Q. Who started talking about jacking?

A. Bruce and Carlos.

Q. When you say jacking, what are you talking about?

A. Like attempting to rob or steal something.

Q. How were you going to go about jacking somebody?

A. Me?

Q. All of you.

A. Can you explain that question?

Q. Sure. How were you planning to jack somebody?

A. How were we planning? Like with, like whether there was a weapon or something or what?

Q. How were you generally going to do it?

A. Generally going to do it, just go and --

Q. What kind of victims, what kind of people

were you looking for to jack?

A. Just looking for things that they like.

Q. Like what?

A. Like those rims on a truck.

Q. Like cars?

A. Yeah. Like cars.

Q. Did you follow cars around?

A. Yes.

Q. When you were following cars around, why were you following cars around?

A. Following cars because they intended to jack.

Q. They intended to jack?

A. They intended to jack them.

Q. By jacking, you're talking about robbing people?

A. Yes, sir.

Q. Do you recall following different cars around intending to jack them?

A. Yes, sir.

Q. Tell the Court about that. How many cars did you follow around?

A. Two.

Q. Tell us about the first car. What kind of car was it?

A. It was a pickup truck with some new nice rims on it.

Q. Where was that located?

A. Somewhere off of Marbach.

Q. Okay. Did you all follow that pickup truck?

A. Yes.

Q. Were you talking about jacking whoever was driving that pickup truck?

A. Yeah. They were talking about jacking it.

MR. FAHLE: Your Honor, I'm sorry. Once again counsel is leading the witness.

THE COURT: This is before the Court. I'm trying to get to the bottom to see whether or not it's admissible before the jury.

Q. (By Mr. Dimaline) Did you follow the truck?

A. Yes.

Q. Where did it go?

A. It went to a house, to some house in some neighborhood.

Q. Had you planned to jack it?

A. They had first. Yeah. They had planned to.

Q. What happened when you followed the car?

A. They got to the house and then the people already went inside the house, so they said forget it.

Q. So those people weren't robbed?

A. They weren't robbed.

Q. But you all intended to try to rob them?

A. Yes.

Q. Do you recall what time that was in the evening?

A. No, I don't.

Q. Was it before midnight?

A. Yes, it was.

Q. Did you follow any other cars that night?

A. A Cadillac on Broadway.

Q. Where did you see that car first?

A. It was closer to Austin Highway than - closer to there.

Q. How far did you follow that car?

A. We followed it up the street to where they live at, to where the people lived.

Q. Were you discussing -- was anybody in the car discussing the plan to jack whoever was driving that car?

A. Yes.

Q. Who was talking about that?

A. Bruce.

Q. Did you follow that car?

A. Yes, we did.

Q. Where did it end up?

A. It ended up at their house off of, I think it was Sheraton Drive.

Q. Sheraton?

A. Yes.

Q. Off of Austin Highway?

A. Yes.

Q. Is that the person that ended up getting robbed in this case?

A. Yes.

Q. How close in time was that to the pickup incident earlier in the evening?

A. About 30, 45 minutes.

Q. Okay.

MR. DIMALINE: Your Honor, I think that's all I need to ask at this point.

THE COURT: Okay. What's the objection, John?

MR. FAHLE: Your Honor, I have no objection except this clearly goes into, you know, something that was clearly 404(b). They have to prove, and they have to show the Court in a hearing outside the presence of the jury

how it is that they're going to prove that this extraneous offense happened beyond a reasonable doubt. And I think in that hearing, therefore, I get to take their witness on cross. So at this point, I would ask for any statements that he made.

In other words, this is a separate hearing. This isn't just a continuation of his testimony, so I get to take him on cross. If they put on any other witnesses to show how they're going to prove that this extraneous offense happened beyond a reasonable doubt, then --

THE COURT: That's for the jury to rule, whether or not it's beyond a reasonable doubt.

MR. FAHLE: Your Honor, the Court has to first -- I'm sorry.

MR. DIMALINE: Your Honor, may I address the Court?

THE COURT: Yes.

MR. DIMALINE: We're not offering this as an extraneous act. This is part of the offense. It's a part of --

THE COURT: Continuation.

MR. DIMALINE: Exactly.

THE COURT: Of what happened that evening, from the time that Bruce picked them up at the bus stop.

MR. DIMALINE: It goes to the intent of the Defendant to commit the aggravated robbery.

MR. FAHLE: Your Honor --

THE COURT: The objection will be overruled. Let's go.

MR. FAHLE: It may go to the intent of the Defendant, and that, under 404(b), might make it admissible if they can prove it beyond a reasonable doubt. In other words, first they have to show why is it admissible under 404(b). One of the reasons is for intent, to show scheme, motive, plan or design. Once they've gotten past that burden, then they have to show that --

THE COURT: The objection is overruled, John. The objection is overruled. Let's go.

MR. FAHLE: Thank you, Your Honor.

THE COURT: Bring the jury back in.

MR. FAHLE: Am I to understand that I

will not be given the opportunity to cross this witness?

THE COURT: You will when he testifies before the jury.

MR. FAHLE: But in this hearing, I will not be given the opportunity to cross examine?

THE COURT: Do you want to cross-examine him?

MR. FAHLE: Yes.

THE COURT: You will have an opportunity before the jury. This was for the benefit of the Court, whether or not I would rule it admissible.

MR. FAHLE: I understand. It's a separate hearing, Your Honor. And I --

THE COURT: Hold the jury. Go ahead and cross-examine him.

MR. FAHLE: Thank you, Your Honor. I first request, under Rule 614, any statements that the witness has previously made.

THE COURT: Son, tap that microphone. It's working. We're having problems hearing you.

(Marked State's Exhibits 1,

2 and 3 for identification.)

MR. DIMALINE: Your Honor, for the limited purpose of this hearing, I'll tender State's Exhibits --

THE COURT: Have the witness identify them.

MR. DIMALINE: Yes, sir.

THE COURT: Rick, make sure that everybody that goes through that door, check whether or not they're witnesses. The young lady, are you sure she's not a witness?

THE BAILIFF: I already asked her. She's not testifying.

Q. (By Mr. Dimaline) Rudy, let me hand you what's been marked for identification purposes as State's Exhibit number 1. Can you identify that three-page document?

A. Yes.

Q. What is that?

A. A statement I gave.

Q. It's your statement?

A. Yes.

Q. Let me hand you what's been marked for identification purposes as State's Exhibit number 2. It's a two-page document. What is that?

A. Another statement.

Q. That you made?

A. Yes.

Q. Let me hand you what's been identified as State's Exhibit number 3. It's another two-page document. Can you identify that?

A. Yes. It's another statement I made.

Q. All these statements were concerning this case?

A. Yes.

MR. DIMALINE: Your Honor, at this time, for the limited purpose of this motion, I'll tender State's Exhibit 1, 2 and 3 to defense counsel for his inspection.

MR. FAHLE: May I have just a moment to review them?

THE COURT: You may.

MR. FAHLE: Pass the witness, Your Honor.

THE COURT: Okay. No questions? Bring the jury back in.

MR. FAHLE: Your Honor, may I complete the objection? Under 38.14, again, I believe that they have to prove, before they can bring in testimony of an extraneous offense.

THE COURT: You already made the motion. I overruled it.

MR. FAHLE: Your Honor, I have one final argument that I wanted to make on that that may persuade the Court. That is, that under 38.14, the testimony of accomplice by itself cannot be, by definition cannot be proof beyond a reasonable doubt. They have to bring in something at this hearing, something else to show the Court how they intend to prove the extraneous offense beyond a reasonable doubt.

THE COURT: The Court is aware of that, but we just started the first witness. The burden is on the State to do that.

MR. FAHLE: I understand, Your Honor. What I'm saying is it should be done in this hearing. They should tell the Court how they're going to do that before the testimony comes in about the extraneous offense.

MR. DIMALINE: Again, I want the record to be clear, we are not presenting this evidence as an extraneous. We think it's a part of the offense. It's during the criminal episode that we're trying. That's our position. It's res gestae of what happened.

THE COURT: Yes. The Court has ruled it's not an extraneous offense. It happened as a continuation from the minute that he was picked up by the Defendant.

MR. FAHLE: The first attempted robbery, Your Honor?

THE COURT: I beg your pardon?

MR. FAHLE: The first attempted robbery? They say it's not extraneous.

THE COURT: Not extraneous. It's all a part of the whole thing from the minute he was picked up until the end.

MR. FAHLE: Your Honor, they gave us notice under 404(b) of extraneous offenses and one of those extraneous offenses was this first attempted robbery. Only one of them, by the way. There weren't several. They weren't following around several people. We never heard that before.

THE COURT: I understand there was no robbery committed of that pickup truck. They went to the house but they gave up on it.

MR. DIMALINE: Right.

MR. FAHLE: Nevertheless, it's an attempt, Your Honor. Intended but failed to

bring about the offense.

THE COURT: Objection overruled.

Let's go.

(Thereupon the jury returned to the courtroom.)

THE COURT: Please have a seat. Okay. Your witness.

MR. DIMALINE: Thank you.

THE COURT: Try and speak loud enough so they can hear you, every one of them.

Q. (By Mr. Dimaline) Rudy, let me try to pick up where we were before we took our break. Where did you and Bruce and Carlos and Jerry go in Jerry's mother's car after you left Bruce's trailer?

A. We were driving down 281.

Q. What was the purpose of driving down 281?

A. We were driving down 281, we were intending - I was there just for the ride, but they were intending to jack.

Q. Who was intending to jack?

MR. FAHLE: Your Honor, I'm sorry. I have to lodge an objection again under 404(b) and under 403. It's more prejudicial than probative. This is an extraneous offense. And I would also like the Court, so I don't have to

keep standing up and interrupting, I would like to lodge a running objection as to any witness who testifies regarding this extraneous offense; that is, the attempted robbery.

THE COURT: Objection overruled.

MR. FAHLE: May I have a running objection, Your Honor?

THE COURT: You may.

MR. FAHLE: Thank you.

MR. DIMALINE: May I proceed?

THE COURT: You may.

Q. (By Mr. Dimaline) You said we were attempting to jack. Who are you talking about when you say that?

A. Attempting to jack? Bruce Fernandez and Carlos Garibay were talking about it.

Q. What were they talking about?

A. About jacking people.

Q. Tell the jury, what did you hear Bruce Fernandez talking about?

A. They were just talking about jacking somebody.

Q. When you say jacking somebody, what do you mean by that?

A. Like either jacking for their car or for

some other stuff that might be valuable.

Q. I don't know, what does jack mean?

A. Attempting to rob.

Q. How was that going to be done?

A. Can you explain that?

Q. Was anything going to be used to rob somebody?

A. With a gun.

Q. Did anybody have a gun in the car that night?

A. Yes.

Q. Who was that?

A. Carlos Garibay had the gun, but Mickey -- Bruce asked for it, and it was given to Bruce.

Q. So what happened when you went on 281 looking for somebody to jack?

A. While we were riding down the highway, Bruce was just yelling out windows, screaming at people.

Q. What was he screaming at people?

A. He was just yelling at them.

Q. What was he yelling?

A. When he would see girls, he would just yell at girls, like what's up. Or if anybody would look at us weird, he would be like, what's your

problem, just trying to piss somebody off.

Q. What happened when you all were driving around doing that?

A. When we were doing that, we spotted a truck.

Q. What kind of truck?

A. It was a new truck. I don't know what kind it was, but it was a new truck.

Q. When you say you spotted a truck, what do you mean by that?

A. We saw a truck with nice rims that they liked.

Q. Why did you like the rims?

A. Because they looked nice.

Q. What did you want to do to that truck?

A. They wanted to jack the rims.

Q. They wanted to jack the rims? What does that mean?

A. To steal the rims.

Q. Okay. Did Jerry follow that pickup truck?

A. Yes.

Q. How far did you all follow that pickup truck?

A. Into a neighborhood where the pickup stopped.

Q. Do you remember where that neighborhood was?

A. Somewhere out by Marbach.

Q. So you followed the pickup truck from 281 all the way to Marbach?

A. Yes.

Q. How far was that?

A. I don't know.

Q. Do you remember what time of the night it was?

A. It was around 10:00. It was before midnight.

Q. Was Bruce talking while you were following that pickup truck?

MR. FAHLE: Your Honor, I'm sorry. Once again I object to leading.

THE COURT: Objection overruled.

Q. (By Mr. Dimaline) Was Bruce talking while you all were following that pickup truck?

A. They were talking about jacking.

Q. What did he say specifically about it?

A. That those rims were nice and they wanted them.

Q. What happened? What happened when you followed that pickup truck?

A. When we followed it, then the pickup got to a house. And then at the house, we saw the people out of the truck, leaving out of the truck. And they were already almost in the door, so we just left.

Q. So why didn't those people get robbed?

A. Because they were --

MR. FAHLE: Your Honor, I'm sorry. Once again, A, it's leading; B, it's suggesting facts not in evidence.

THE COURT: Objection overruled.

Q. (By Mr. Dimaline) Why didn't those people get robbed?

A. Because they were already just about in the house.

Q. And that's the reason they weren't robbed?

A. That's the reason why they weren't robbed.

Q. Who was the one that was going to actually do the jacking or the robbery?

A. Bruce.

Q. Who decided that?

A. Well, he's the one that had the gun. He said that he wanted to do it.

Q. Where did Bruce get the gun?

A. It was handed to him from Carlos.

Q. Had you ever seen that gun before?

A. Yes, I have.

Q. Where have you seen it before?

A. Carlos had it once.

Q. What does that gun look like?

A. It's black. I know it's black. It's like a nine millimeter.

Q. Do you know much about guns?

A. Not really.

Q. So it was a black nine millimeter?

A. Yes.

Q. Is that a revolver or semi-automatic or what?

A. I think it was semi-automatic.

MR. DIMALINE: May I approach the witness?

THE COURT: You may.

(Marked State's Exhibit No. 4 for identification.)

Q. (By Mr. Dimaline) Rudy, let me hand you what's been marked as State's Exhibit number 4.

MR. FAHLE: Your Honor, I'm sorry. Could we approach before that's handed to that witness?

THE COURT: You may.

(Discussion at the bench.)

MR. FAHLE: Your Honor, I apologize. The only issue I wanted to cover is handing a live weapon to a person who's already pled guilty to an offense. If nothing else, he's a convicted -- he can't be in possession of that.

THE COURT: Objection overruled.

MR. FAHLE: For safety sake.

THE COURT: Objection overruled.

MR. FAHLE: Thank you.

(Back before the jury.)

Q. (By Mr. Dimaline) Rudy, once again let me hand you what's been marked as State's Exhibit number 4. Does that gun look familiar?

A. Yes.

Q. Is that gun similar to the gun that you saw Carlos Garibay give Bruce Fernandez?

A. Yes, it is.

Q. And did -- who had that gun while you all were following that pickup truck?

A. Bruce.

Q. Was he doing anything with that gun?

A. Just playing with it.

Q. When you say playing with it, what do you mean?

A. He was just looking at it and just playing

with the safety button.

Q. Did he have it in his hand?

A. Yes.

Q. Was he holding onto it?

A. He had it by the pistol grip, but his finger was away from the trigger.

Q. And what happened after those people went into that house that were driving the white pickup truck?

A. We left.

Q. Do you know what time that was, about?

A. No.

Q. Was it before midnight?

A. Yes.

Q. And what happened after you left that house off of Marbach? Where did you all go?

A. We started like going back towards home. We went down Broadway.

Q. You went down Broadway?

A. Yes.

Q. Where exactly on Broadway do you remember being?

A. By that HEB on Broadway.

Q. In Alamo Heights?

A. Yes.

Q. Are you familiar with Hildebrand?

A. No.

Q. Okay. If I were to show you a map, do you think you could maybe find where that is?

A. What, Hildebrand?

Q. Where that HEB was.

A. Yeah.

Q. Let me ask you this: Are you familiar with where Austin Highway and Broadway is?

A. Yes.

Q. How far from Austin Highway and Broadway do you remember being on Broadway?

A. About half a mile.

Q. Okay. And what happened when you were driving down Broadway Street?

A. Well, they spotted two separate Cadillacs driving in front of us.

Q. When you say they, who are you talking about?

A. Carlos and Bruce.

Q. What did Bruce say about those Cadillacs?

A. That he wanted one of them. He wanted to jack one of them.

Q. He wanted to rob one of the cars?

A. Yes.

Q. And what was your understanding of -- when he said he wanted to jack one of these Cadillacs, what did you understand that to mean?

A. He wanted to rob the people inside.

Q. So he wanted to take whatever they had?

A. Yes.

Q. What was it that you all were after?

A. They were after money.

Q. Can you describe this Cadillac?

A. All I know about it, it was like a newer Cadillac, new Cadillac. Kind of like a beige or tan color.

Q. Why did you all pick out a Cadillac?

A. It was just those were those two cars in front of us that we saw.

Q. Why would you pick out a Cadillac?

A. Because whoever was driving had more money.

Q. Where do you remember seeing that Cadillac on Broadway?

A. By the HEB.

Q. Did Jerry follow that Cadillac?

MR. FAHLE: Your Honor, I'm sorry. Once again leading.

THE COURT: Don't lead your witness.

Sustain the objection.

MR. FAHLE: And, Your Honor, I'd also ask the jury to be instruct -- well, I'm sorry. There was no answer. I apologize.

Q. (By Mr. Dimaline) What happened when you all spotted that Cadillac? What did you all do?

A. We started following it.

Q. Who was driving?

A. Jerry.

Q. How far did you follow it?

A. Down the street to where they live, to where the people lived.

Q. Describe for the jury what direction did that Cadillac go?

A. It turned right on Austin Highway, then it made another right on Sheraton Drive, I think.

MR. DIMALINE: May I approach the witness?

THE COURT: You may.

(Marked State's Exhibit No. 5 for identification.)

Q. (By Mr. Dimaline) Rudy, I'm going to hand you what's been marked as State's Exhibit number 5. Can you identify this for the record? What is this?

A. A map of the area where we were at.

Q. Does this map look accurate as far as the locations of the streets in that area?

A. Yes.

Q. Does it accurately depict the streets on October 20th, 1994 when you all were driving around?

A. Yes.

Q. With the Court's permission, could you step down here, please?

THE COURT: Permission granted.

MR. FAHLE: Your Honor, I'm sorry, but could --

THE COURT: You may move wherever is convenient for you.

MR. FAHLE: Yeah. But before that's shown to the jury, that document is not in evidence.

THE COURT: The objection will be sustained.

MR. FAHLE: Thank you.

MR. DIMALINE: Well, we'll offer it in evidence, Judge.

MR. FAHLE: May I?

THE COURT: You may.

MR. FAHLE: No objection.

THE COURT: State's Exhibit number 5

will be admitted into evidence; no objection from the defense.

Q. (By Mr. Dimaline) Have you seen this map before, Rudy?

A. Yes.

MR. DIMALINE: May I?

THE COURT: You may. And move wherever it's convenient for you. Make sure that each and every juror sees it. I see the ones up there on the left can't see it. Turn it this other way.

Q. (By Mr. Dimaline) Do you see Broadway Street on this map?

A. Right here.

Q. Can you point that out for the jury?

A. It's right here.

Q. Where did that car turn on Broadway?

A. Where did it turn from?

Q. Uh-huh.

COURT REPORTER: I can't hear, Judge.

THE COURT: The gentleman over there can't see and the court reporter can't hear you. You need to speak up. For a big man like that, your voice is very low. Speak up now.

Q. (By Mr. Dimaline) You indicated you saw

the car at HEB on Broadway?

A. Yes.

Q. How did you turn onto Austin Highway off Broadway?

A. It was a right.

Q. Can you take this pen and track Broadway to where it hits Austin Highway and show the jury the direction you went.

MR. FAHLE: Before he does that, I would object to him marking on a document that's in evidence. It's now in evidence. He's testifying from it. He can't now alter it.

MR. DIMALINE: Well, Your Honor.

THE COURT: Objection is overruled. Can you put it somewhere else? You've got it at an angle where that juror on the corner can't see.

MR. DIMALINE: Judge, I'm going to have him mark it and then we'll show it to the jury.

THE COURT: Have him mark it in the presence of each and every one of those jurors. Each and every one of the jurors is a judge.

MR. FAHLE: Your Honor, that's a document already in evidence and I would object

to them marking on it.

THE COURT: Objection overruled.

Q. (By Mr. Dimaline) Take the pen and show the path that you took up Broadway to Austin Highway.

A. We were going straight up on Broadway then we turned right on Austin Highway.

Q. And then where did you go after that?

A. We went over -- we were following -- I don't know where Sheraton Street is.

Q. Sheraton? Is this Sheraton Street right here?

A. Yeah. Then we turned right onto Sheraton.

THE COURT: We can't hear a word. The court reporter and I are having problems.

Q. (By Mr. Dimaline) You turned on Sheraton Street off of Austin Highway?

A. Yes.

Q. Thank you. You can have a seat.

THE COURT: Speak up. Speak up.

Q. (By Mr. Dimaline) Did you see any police cars when you were following that Cadillac?

A. There was one that drove by.

Q. Later?

A. Yeah. Later.

Q. What happened when you turned onto

Sheraton Street when you followed that Cadillac?

A. Well, Bruce got out, out of the car.

Q. Who was driving?

A. Jerry.

Q. Did Jerry do anything as he stopped the car?

A. The headlights were turned off. We just had our parking lights on.

Q. He turned off the headlights? Do you know why he did that?

A. No. I don't know.

MR. FAHLE: Your Honor, I'm sorry. That calls for speculation. Sustain the objection. Disregard that, members of the jury. Don't answer that question.

Q. (By Mr. Dimaline) Where was the car that you were in when Jerry turned off the headlights in relation to the Cadillac?

A. We had just turned right there on the street right there by the driveway where the Cadillac was at.

Q. And the driveway that the Cadillac turned in, how far was that from Austin Highway on that street Sheraton?

A. Just like right around the corner.

Q. What happened when you saw the people drive that Cadillac to their house?

A. That's when Bruce jumped out of the car and ran up, like snuck up there and waited for them to get out.

Q. Did Bruce have anything with him when he got out of the car?

A. He had the gun.

Q. Was it a gun similar to the one that you identified as State's Exhibit number 4?

A. Yes, it was.

Q. Can you describe to the jury what was Bruce wearing at that point?

A. He had on dark-colored clothing with like a beanie on his head, like a bandanna over his face.

Q. When you say dark-colored, do you know what color his pants and shirt were?

A. I think his pants were black.

Q. What about his shirt?

A. I don't recall the color of that, but it was dark.

Q. Describe, what do you mean by a beanie? What is a beanie?

A. It's like -- okay. It's like something you put on your head. It's kind of like a face mask

but it don't go over the face, it just stays up above the eyebrows.

Q. How did Bruce have this beanie on his head?

A. Lowered to about here on his eyebrows.

Q. For the record, you're pointing across the top of your eyebrows?

A. Yes.

Q. Did Bruce have anything else on his face?

A. A bandanna.

Q. Describe for the jury, how did he have that bandanna on?

A. He had that colored bandanna over his face just to show his eyes.

Q. For the record, you're indicating right across the top of your nose?

A. Yes.

Q. And what happened? Did you see Bruce get out of the car?

A. Yes.

Q. What did you see happen?

A. I saw him sneaking up to the driveway and then pointing the gun at the people.

Q. When you say sneaking, what do you mean by that?

A. Like if he was trying not to be seen. So he could get over there so they wouldn't see him.

Q. What did Jerry do, the driver of that car, when Bruce got out?

A. Jerry just took off and turned up the street and tried to turn around to leave.

Q. Okay. Do you know where he turned? Do you remember where he turned?

A. On a street called Morningside or something like that.

MR. DIMALINE: May I approach the witness?

THE COURT: You may.

(Marked State's Exhibit No. 6 for identification.)

Q. (By Mr. Dimaline) Rudy, let me hand you what we've had marked State's Exhibit number 6. Can you identify this for the record?

A. Yes, I can.

Q. What is that?

A. It's a map of the subdivision that we were in.

Q. Okay. Does this map accurately portray the streets as you remember them on October the 20th, 1994?

A. Yes, it does.

Q. Okay. With this pen, can you mark on State's Exhibit number 6 the route that you took off of Austin Highway onto Sheraton Street?

A. (Indicating.)

Q. And can you mark on this as a continuing of that red line, where did Jerry drive when Bruce got out?

A. (Indicating.)

Q. For the record, you've indicated a north on Morningside.?

A. Yes.

Q. What happened when he turned north on Morningside?

A. He found there was no way to get out of there, so he turned up a driveway to turn back around.

Q. To turn back around on Morningside?

A. Yes.

Q. Which direction were you going at that time?

A. At that time? We were heading back south on Morningside and then back up Sheraton.

MR. DIMALINE: Okay. Your Honor, at this time I'll tender State's Exhibit number 6 and offer it into evidence.

MR. FAHLE: No objection, Your Honor.

THE COURT: State's Exhibit number 6 will be admitted into evidence; no objection from the Defense. Let's take a five-minute recess. Take the jury out, please.

(Out of the presence of the jury:)

THE COURT: Talk to your witness. The jury is complaining they can't hear him.

MR. DIMALINE: Okay.

THE COURT: I'll be right back. I'm going to my chambers. Five minutes.

(Marked State's Exhibit No. 7 for identification.)

(Recess.)

THE COURT: Please have a seat. We hope to hang on to until 12:00, a little before, a little after 12:00. A little before, a little after. Most likely before. Okay. Your witness.

Q. (By Mr. Dimaline) Rudy, can you step down here? We made a little error on this map. I want to have you fix it. For the record, this is State's Exhibit number 5. I want you to come down here so everybody can see it. Can you take this bigger red

marker and show the --

THE COURT: John, wherever is convenient for you. Wherever is convenient for you.

Q. (By Mr. Dimaline) Is that the path you took?

A. Yes.

Q. Okay. So earlier you marked Sheraton, which is down at the other end.

A. Yes.

Q. But it's actually up here?

A. Yes.

THE COURT: I can't hear a word. Did you hear anything? I didn't hear anything. I heard the prosecutor. While we took you out, we talked to the State about talking to the witness about speaking up. We're having problems.

Q. (By Mr. Dimaline) Rudy, this other map that you were marking on, which is State's Exhibit number 6, which is being shown on the screen.

THE COURT: Can you tilt it a little more for this gentleman over here? That's better. Can you see? Everybody can see? Okay. Fine.

MR. FAHLE: May I, Your Honor?

Q. (By Mr. Dimaline) If you could please step down to State's Exhibit number 6 down here.

THE COURT: There's a pointer. See that pointer? Pull it out so you won't block the view.

Q. (By Mr. Dimaline) I believe you've already indicated the path that Jerry drove on the map already. Can you mark where approximately he turned the car around?

MR. FAHLE: Your Honor, I would again object to them marking on a document that's already in evidence. On this one they did it right. They had it marked before it was put in evidence and they offered it in evidence. Now it can't be altered.

THE COURT: Objection overruled. Go ahead.

Q. (By Mr. Dimaline) And then at that point, which direction did Jerry turn the car?

A. Back toward the south on Morningside.

Q. You need to speak up real loud.

A. Turned back south on Morningside.

Q. Where did he go?

A. All the way back to Sheraton Drive.

Q. So you're heading the opposite direction

that you came in on?

A. Yes.

Q. And you stopped there? Did you stop there for a reason? What's at that location?

A. We didn't stop there. We kept going.

Q. What's at that location that you just stopped at?

A. Stopped at the arrow to show we were going up that way.

Q. Is that where the house was?

A. The house was here.

MR. DIMALINE: Keep standing here for a second.

(Marked State's Exhibit No. 8 for identification.)

Q. (By Mr. Dimaline) Rudy, let me hand you what's been marked for identification purposes as State's Exhibit number 8. What is that a picture of?

A. The driveway of the person that was robbed.

Q. Is that the driveway that Bruce Fernandez robbed those people?

A. Yes.

Q. Is this how it looked on October the 20th, 1994?

A. Yes.

MR. DIMALINE: Your Honor, at this time we'll tender State's Exhibit number 8 to defense counsel.

THE COURT: What's the number?

MR. DIMALINE: Number 8; and offer it into evidence.

MR. FAHLE: No objection, Your Honor.

THE COURT: State's Exhibit number 8 will be admitted into evidence; no objection from the defense.

MR. DIMALINE: May I publish it to the jury?

THE COURT: You may.

Q. (By Mr. Dimaline) Can you step down here with that pointer and show the jury what direction did Jerry come by that house when you all were driving by it?

A. When we were leaving or --

Q. Yes.

A. When we were leaving? We were going back out that way.

Q. Okay. Who was in the car at that point?

A. Me, Carlos and Jerry.

Q. Where was everybody situated in that car?

A. Jerry was driving, Carlos was the front passenger, and I was behind Carlos.

Q. What exactly did you see when you looked out of that car?

A. I saw Bruce Fernandez pointing a gun at the people he robbed over here.

Q. Where exactly was Bruce Fernandez when you saw him robbing those people?

A. About right here.

Q. Okay. For the record, you're pointing inside the garage on State's Exhibit number 8?

A. He wasn't inside the garage.

Q. Right at the edge of it?

A. At the edge of it.

Q. Where was the person that he was robbing?

A. In the garage.

Q. What exactly did you see Bruce Fernandez doing at that point?

A. Holding a gun up to them.

Q. Can you come out here, please? I want you to take State's Exhibit number 4. Come over here in front of the jury and pretend like you're Bruce Fernandez. How far was the person you saw him robbing from him?

A. From like --

Q. If I'm that person.

A. If you're that person? About to like a little bit further than this.

Q. Show the jury what exactly did you see Bruce Fernandez do?

A. He had the gun pointed at them like that.

Q. For the record, you're using State's Exhibit number 4, and you're tilting it sideways?

A. Yes.

Q. He was not holding it straight?

A. No.

Q. Holding it sideways. And he was pointing it at?

A. At them.

Q. At the person?

A. Yes.

Q. Did you see that person?

A. Yes.

Q. What did he look like?

A. He was an older type guy with -- he had like gray hair.

Q. Was he Hispanic? Was he white?

A. He was white.

Q. Caucasian like me?

A. Yes.

Q. Okay. And could you hear what was going on?

A. No. I couldn't.

Q. Okay. What did you see, other than Bruce pointing the gun sideways at the guy?

A. That's all I saw. When we drove by, that's all I saw.

MR. FAHLE: Your Honor, if he's through with that exhibit --

THE COURT: It's empty. We already checked it. It's been checked by the Court and also by the bailiff.

MR. FAHLE: Thank you, Your Honor.

Q. (By Mr. Dimaline) Did you see anybody else that got out of that car, that Cadillac?

A. I think it was his wife.

Q. So there was a lady there, too?

A. Yes.

THE COURT: Speak up, son. Speak up.

Q. (By Mr. Dimaline) Do you recall where she was?

A. She was standing next to her husband.

Q. Okay. Did you see Bruce Fernandez do anything else?

A. No, I didn't.

Q. What happened at that point?

A. At that point, okay, we were driving by, and that's when I saw him holding them up.

Q. Why don't you have a seat and speak into that microphone.

A. Okay. We were driving by, and we saw Bruce. He was holding them up. But we were leaving. We got to a stop sign, and that's when Bruce forced himself back into the car.

Q. Okay. When you're talking about Bruce, are you talking about the same Defendant that you identified earlier?

A. Yes.

Q. Did you see any other cars in the area?

A. A police car was coming in.

Q. At what point did you see a police car coming in?

A. When we were leaving.

Q. Where exactly were you when you saw that police car?

A. By off of -- when we were just turning off of Morningside to get onto Sheraton.

Q. What direction was that police car going?

A. It was going west on Sheraton.

Q. Towards where you were?

A. Yes.

Q. What was going on in the car? What were you all thinking at that point?

A. Me, Carlos and Jerry were thinking we don't want to go through with this. So we were going to leave.

Q. You were going to leave Bruce behind?

A. Yes.

Q. And what happened at that point? When you saw that police car, what happened?

A. We got scared.

Q. Is that when you just described for the jury what you saw Bruce do?

A. Yeah.

Q. What did Jerry do at that point?

A. Jerry just started driving away.

Q. Where did Jerry drive?

A. We pulled up to a stop sign by the intersection of Austin Highway and Sheraton, and that's when Bruce was forcing himself into the car.

Q. So did you see Bruce again at that point?

A. Yes. When he was forcing himself in. Yes, I did.

Q. What was he doing?

A. Jumping into the car.

Q. Did he have anything in his hands?

A. He had the gun and the purse.

Q. When you say the purse, can you describe that?

A. Describe the purse?

Q. Yes.

A. Yes.

Q. What did it look like?

A. It was black. It was a black purse like kind of like loops on it, like lines that were all around it, but it was just one solid black color.

Q. What was Bruce doing with that purse?

A. He robbed it, so he was bringing it to the car.

MR. DIMALINE: May I approach the witness?

THE COURT: You may.

(Marked State's Exhibit No. 9 for identification.)

Q. (By Mr. Dimaline) Rudy, let me show you what's been marked as State's Exhibit number 9. Can you identify that for the record?

A. Yes.

Q. What is it?

A. The purse that Bruce threw in.

Q. Is this the purse that you saw Bruce Fernandez carrying after he robbed those people?

A. Yes.

MR. DIMALINE: Your Honor, at this time we'd like to offer State's Exhibit number 9.

MR. FAHLE: Your Honor, we have no objection to the exhibit itself. There are, I believe, there appear to be some documents inside the exhibit which have not been identified.

MR. DIMALINE: Let me mark those for the record.

THE COURT: State's Exhibit number 9 will be admitted into evidence; no objections.

MR. DIMALINE: Can we approach the bench?

THE COURT: You may.

(Discussion at the bench.)

MR. DIMALINE: Your Honor, for the record there's 18 cards that were in the purse. I'd like to have one marked, and maybe if we could stipulate to the number of cards so I don't have to mark every single one.

THE COURT: All the same?

MR. DIMALINE: All the same.

THE COURT: What are the cards?

MR. DIMALINE: They're business cards.

MR. FAHLE: I just want to make sure they're all the same.

THE COURT: What says the defense?

MR. FAHLE: I have no objection to stipulating to the number of them; however, I will probably have an objection to the admissibility.

MR. DIMALINE: We'll get to that in a second.

THE COURT: They were in the purse.

(Back before the jury.)

THE COURT: Bind them together and mark one of them. Stipulate there's so many.

(Marked State's Exhibit No. 10 for identification.)

Q. (By Mr. Dimaline) Rudy, you just saw me pull out some cards that were in this purse, State's Exhibit number 9, didn't you?

A. Yes, I did.

Q. Let me hand you what's been marked as State's Exhibit number 10. That's a stack of 18 cards; is it not?

A. Yes, it is.

Q. Were those the cards that were inside State's Exhibit number 9 that you previously identified as the purse that Bruce Fernandez took in the robbery?

A. Yes.

MR. DIMALINE: Your Honor, at this time I'd like to offer State's Exhibit number 10.

MR. FAHLE: May I take the witness on Voir Dire, Your Honor?

THE COURT: You may.

VOIR DIRE EXAMINATION

BY MR. FAHLE:

Q. Rudy, my name is John Fahle. Together with Suzanne Kramer, we represent the Defendant in this case, Bruce Fernandez. We have not met before, have we?

A. Huh-uh.

Q. Okay. I just want to ask you one or two questions. You've seen these cards before?

A. No, I haven't.

Q. Do you have any personal knowledge whether they were in the purse or not?

A. No, I didn't.

MR. FAHLE: Your Honor, I would object on the grounds that he doesn't have any personal knowledge to sponsor these documents.

THE COURT: The objection will be sustained.

MR. DIMALINE: We'll lay the predicate later, Judge.

DIRECT EXAMINATION RESUMED

BY MR. DIMALINE:

Q. One thing I failed to ask you about when Bruce got out of Roger's car, or Jerry's car, I'm sorry, did you hear any noise?

A. I heard like --

MR. FAHLE: Your Honor, I'd object to what I think this witness is about to go into based on 404(b). We've discussed this before in a Motion in Limine. Based on both 404(b) as an uncharged extraneous offense, and also based on 403, more prejudicial than probative.

THE COURT: The objection is overruled. You may answer the question.

MR. FAHLE: Your Honor, may I have a running objection so I don't have to keep standing up?

THE COURT: You may.

MR. FAHLE: To any testimony regarding what this witness is about to describe to the jury.

THE COURT: You may.

MR. FAHLE: Thank you.

Q. (By Mr. Dimaline) Did you hear a noise?

A. I heard like a click.

Q. What kind of a click?

A. Like a gun being cocked.

Q. Have you ever heard of the term racking, racking a gun?

A. No. I haven't.

MR. DIMALINE: May I approach the witness?

THE COURT: You may.

Q. (By Mr. Dimaline) For the record, I'm taking what's been marked as State's Exhibit number 4. That sound that you heard, is that consistent with what you're hearing right now?

A. Yes, it is.

Q. For the record, I'm sliding the chamber back on State's Exhibit number 4. Is that the clicking noise that you heard?

A. Yes, it is.

Q. Do you know what happens when you do that

to a semi-automatic weapon?

A. Yes, I do.

Q. What happens?

A. It's able to fire.

MR. FAHLE: Your Honor, I'm sorry. This witness has already testified that he has no knowledge of guns and that he doesn't know what that sound is.

THE COURT: The objection is overruled.

Q. (By Mr. Dimaline) You can answer that. What happens when you do that?

A. It's able to get fired.

Q. Okay. It puts a bullet in the chamber, doesn't it?

A. Yes.

Q. When did that happen that you heard that noise?

A. When he was getting out of the car.

Q. The first time?

A. The time when he was going, when he robbed the people in the Cadillac.

Q. So before he went up to those people in the Cadillac, he did that?

A. Yes.

Q. Now, when Jerry turned the car around and you saw Bruce robbing those people and you went to the corner of Sheraton and Austin Highway, describe for the jury what you saw. What happened at that point when you all were at that intersection?

A. At that point, Bruce Fernandez went into the car, forced himself in. And when he was forcing himself in, he said: "Drive."

Q. He said: "Drive?"

A. Yeah. He said: "Drive."

Q. Who was he talking to?

A. To Jerry.

Q. What did Jerry do?

A. He hesitated and looked towards Carlos and kind of shook his head no.

Q. Okay. At that point, did Bruce Fernandez have anything in his hands?

A. He had the gun, and it was like pointed towards Jerry.

Q. What about the purse? What happened to the purse?

A. He had threw it in and hit me on the side.

Q. Is that the first time that you saw State's Exhibit number 9?

A. No, it's not.

Q. The first time that you felt it, touched it?

A. Yes.

Q. Describe for the jury what side of the car was Bruce Fernandez getting in?

A. He was getting into the passenger side.

Q. On the front or the rear?

A. The rear.

Q. Where were you seated at that time?

A. I was sitting in the rear passenger side.

Q. Did you open the door?

A. No, I didn't.

Q. Who opened the door?

A. Bruce did.

Q. How did he appear at that point when he opened the door?

A. Can you explain it?

Q. How would you describe him?

A. How would I describe him? Well, like he was rushing in.

Q. Was he in a hurry?

A. Yeah. In a hurry.

Q. Was he excited?

A. Yes.

Q. What did he say?

A. He just got in. The gun was pointing at Jerry, and he said: "Drive."

Q. Okay. And what happened?

A. Jerry hesitated, looked towards Carlos and shook his head no. And then the gun went off.

Q. Okay. The gun went off?

MR. FAHLE: Your Honor, I'm sorry. Again I object to this line of testimony. This is uncharged extraneous misconduct.

THE COURT: The objection is overruled.

MR. FAHLE: Also under Rule 403.

THE COURT: Objection overruled.

MR. FAHLE: It's more prejudicial than probative.

THE COURT: Objection overruled. Go ahead.

Q. (By Mr. Dimaline) When you say the gun went off, are you talking about the gun that was used in the robbery?

A. Yes.

Q. And explain exactly what you saw.

A. I saw, all I saw was Bruce rushing in and saying "drive." And the gun went off and struck Jerry.

Q. Where did it strike Jerry?

A. Around the neck.

Q. How did you know it struck him in the neck?

A. Because later on when Bruce was getting out, Carlos Garibay said, "You shot Jerry." And he saw it.

MR. FAHLE: Your Honor, I'm sorry. I object to the hearsay.

THE COURT: The objection is overruled.

Q. (By Mr. Dimaline) Go ahead.

A. When we pulled off to the side to get help, we saw where the blood was coming out of.

Q. So what happened after Bruce Fernandez shot Jerry Lopez in the head?

MR. FAHLE: Your Honor, that's assuming a fact not in evidence. He never said he shot him in the head.

Q. (By Mr. Dimaline) Shot him in the neck. Excuse me.

THE COURT: Objection overruled.

THE WITNESS: Bruce was getting out of the car saying, "You all don't know me."

Q. (By Mr. Dimaline) You all don't know me?

A. Yeah. You all don't know me.

Q. What did you take that to mean?

MR. FAHLE: Your Honor, I don't think it matters what this witness took that to mean.

THE COURT: The objection is overruled. Answer the question.

THE WITNESS: To cover up.

Q. (By Mr. Dimaline) What did you think at that point? What was going on in your head?

A. I was scared.

Q. Why were you scared?

A. Because I never seen anything like that. I didn't know, you know, what was going to happen to me.

Q. You had never seen anything like what?

A. Like anybody get shot.

Q. Were you scared of anybody in particular?

A. Am I scared of anybody?

Q. Uh-huh.

A. Just anybody that would have a gun or threaten me.

Q. Or were you scared of getting caught at that point?

A. Yes.

Q. So what did Bruce do when he said, "You

don't know me?" Did he get out of the car?

A. He jumped out of the car, and another shot was fired.

Q. Another shot was fired?

A. Yes.

Q. Where was that fired?

A. It was either right inside the car or right as soon as he got out.

Q. Did you hear the gun shot?

A. Yes, I did.

Q. Did it sound like it was coming from that same gun?

A. Yes, it did.

Q. Did anybody get shot after that shot went off?

A. No.

Q. What did you see Bruce Fernandez doing at that point?

A. He just jumped out of the car, and that's the last I saw of him.

Q. Do you remember seeing him run from that intersection?

A. No, I don't.

Q. Is that the last time you saw him?

A. Yes, it was.

Q. Until today?

A. Until today.

Q. Did you stay in the car?

A. Yes, I did.

Q. Did Carlos stay in the car?

A. Yes, he did.

Q. What happened?

A. After Jerry was shot, Jerry drove onto Austin Highway. And then Carlos grabbed the wheel with his left hand and pulled over to the left side of the road and was able to stop the car and put it in park.

Q. How far was Jerry able to drive that car?

A. About a quarter of a mile.

Q. Which direction did the car run off the road?

A. It went towards the left.

Q. Did you go across the traffic on Austin Highway?

A. Yes, we did.

Q. Did the car stop?

A. Yes. Jerry was able to stop it and Carlos put it in park.

Q. What was Jerry doing at that point?

A. At that point, he was coughing up blood.

Q. Was he bleeding?

A. Yes, he was.

Q. Did you see blood?

A. Yes, I did.

MR. FAHLE: I think that's been asked and answered, Your Honor.

Q. (By Mr. Dimaline) Was he bleeding from the neck?

A. Yes.

MR. FAHLE: Your Honor, could I get a ruling on that?

THE COURT: What's your objection?

MR. FAHLE: It's asked and answered. It's repetitive, cumulative.

THE COURT: Objection overruled.

Q. (By Mr. Dimaline) What happened when the car stopped?

A. When the car stopped, we all got out. We saw a cop that we passed by, and Garibay ran to the cop for help. Telling him that --

Q. So everybody got out of the car?

A. Yes.

Q. Including Jerry?

A. Yes.

Q. He was still able to move?

A. Yes.

Q. Did you get out of the car?

A. Yes, I did.

Q. What happened when you got out of the car?

A. Me, I followed Garibay to where the cop was to tell him that our friend was shot.

Q. You told a cop that your friend was shot?

A. Yes.

MR. FAHLE: Again, Your Honor, object to the hearsay. His own out-of-court statement is just every bit as much hearsay as somebody else's.

THE COURT: Objection overruled.

Q. (By Mr. Dimaline) Do you remember what kind of police officer you were talking to?

A. It was a San Antonio police officer.

Q. S.A.P.D.?

A. Yes, it was.

Q. Not Terrell Hills?

A. No, it wasn't.

Q. What did you tell that San Antonio police officer?

MR. FAHLE: Your Honor, again I would object to hearsay.

THE COURT: Objection overruled.

THE WITNESS: We told him that our friend was shot.

Q. (By Mr. Dimaline) Did you tell him who shot him?

A. He asked us who, but at first we tried to cover up.

Q. Why were you covering up?

A. Because at first we were just covering up really because Mickey, Bruce had said "You all don't know me." And then Carlos had said "Get out of here. Just get out of here." So first we had tried to cover up.

Q. What else did you tell that policeman?

MR. FAHLE: Again, Your Honor, I object to hearsay.

THE COURT: Overruled.

THE WITNESS: We told him that our friend was shot and that he was bleeding a lot, you know, that he needed an ambulance.

Q. (By Mr. Dimaline) Did you describe the person that shot your friend to the police?

MR. FAHLE: Objection to hearsay, Your Honor.

THE COURT: Overruled.

THE WITNESS: Not to that S.A.P.D.

officer.

Q. (By Mr. Dimaline) Do you know if Carlos Garibay talked to that same officer?

A. I don't know.

Q. And what happened after that, after you talked to that police officer?

A. After we talked to the police officer, we ran over there to where Jerry was to check on him to see if there was somebody there.

Q. Where did Jerry end up?

A. He had fallen in front of some motel, by some motel on the side of the road.

Q. You say fallen. What do you mean by that?

A. He fell down.

Q. Did he collapse?

A. Yes.

Q. Was anybody trying to treat him?

A. Not at the moment.

Q. What happened to him after that?

A. After that, he was laying down. Garibay got him in his lap and he kept trying to talk, but Garibay told him to be quiet, not to talk.

MR. FAHLE: Your Honor, I object to hearsay.

THE COURT: Overruled.

Q. (By Mr. Dimaline) So Carlos told him not to talk?

A. Yes.

Q. Were the police present at that time?

A. Yes. He was calling for an ambulance.

Q. Was Carlos trying to talk? I'm sorry. Was Jerry trying to talk?

A. He was trying to, but nothing would come out of his mouth.

Q. Describe that to the jury. What did you see?

A. Jerry -- okay. Carlos was, you know, kneeling down on his knees and had, Garibay had Jerry in his lap and was telling him not to talk, because Jerry was trying to talk. But every time he would try to talk, blood would keep gushing out of his mouth.

Q. Were you able to understand anything that Jerry was saying?

A. No. Nothing was able to come out.

Q. Did EMS arrive at the scene?

A. Yes.

MR. FAHLE: Leading, Your Honor.

THE COURT: Sustain the objection. Don't answer that.

Q. (By Mr. Dimaline) Did anybody treat him

at the scene?

A. Yes.

Q. Who treated him?

A. EMS. When EMS got there, that's when they started to treat him. They put him on a stretcher and put him in an ambulance. I didn't see what happened after that.

Q. Have you seen Jerry since then?

A. No, I haven't.

Q. Do you know what happened to him?

A. Yes, I do.

MR. FAHLE: Your Honor, I object. This witness has no personal knowledge.

THE COURT: Objection overruled.

MR. FAHLE: That any knowledge that he has is based on hearsay.

THE COURT: Objection overruled.

MR. FAHLE: May I take the witness on Voir Dire?

THE COURT: Objection overruled.

MR. FAHLE: Thank you, Your Honor.

Q. (By Mr. Dimaline) What happened to him?

A. He died.

Q. Did you go to his funeral?

A. No, I didn't.

Q. Did other police officers arrive at the scene?

A. Yes.

Q. What jurisdiction were they from?

A. Terrell Hills.

Q. And what happened when the Terrell Hills police came?

A. He came by and said those guys were involved in a robbery.

Q. When you say those guys, who are you talking about?

A. Me and Carlos.

MR. FAHLE: I'm sorry, Your Honor. I object to the hearsay again.

THE COURT: Overruled.

Q. (By Mr. Dimaline) You can answer that question. Who are you talking about?

A. Me and Carlos.

Q. Okay. Were they talking about Jerry, too?

A. Yes.

Q. Did you talk to that police officer?

A. No. He just said that we were involved in it, and they put the handcuffs.

MR. FAHLE: Object to the hearsay, Your Honor.

THE COURT: Overruled.

Q. (By Mr. Dimaline) Did the police officer bring anybody else to the scene out there on Austin Highway?

A. Yes, he did.

Q. Who did he bring?

A. The person that was robbed.

Q. The person that you saw Bruce Fernandez robbing?

A. Yes.

Q. What was he doing out there?

A. Probably trying to identify.

MR. FAHLE: Your Honor, I'm sorry. That calls for speculation. I don't think this witness has any personal knowledge to answer that question.

THE COURT: Overruled. You may answer the question.

Q. (By Mr. Dimaline) What did you see --

MR. FAHLE: May I take the witness on Voir Dire to find out if he has personal knowledge, Your Honor?

THE COURT: No.

MR. FAHLE: I may not?

THE COURT: No. You may not.

MR. FAHLE: Thank you.

Q. (By Mr. Dimaline) What did you see the complainant, the person who was robbed, what was he doing out there at the scene?

A. Well, first he walked up to the police car that Garibay was in and he looked in and shook his head no.

MR. FAHLE: Your Honor, I would object to that hearsay response.

THE COURT: Overruled.

MR. FAHLE: The expression of activity, shaking his head no.

Q. (By Mr. Dimaline) What else?

A. Then he walked over to where I was and then did the same.

Q. Shook his head?

A. Yes.

Q. How did he do it? Show the jury.

A. He was like (indicating).

MR. FAHLE: Again, I would object to that hearsay response, Your Honor.

Q. (By Mr. Dimaline) For the record, you're shaking your head side to side?

A. Yes.

Q. What else did you see that person do?

A. Just talking to the cops.

Q. Did you see him walk over to where Jerry was?

MR. FAHLE: Leading the witness, Your Honor.

THE WITNESS: No, I didn't.

MR. FAHLE: Your Honor, I'm sorry.

THE COURT: Overruled. You may answer the question.

Q. (By Mr. Dimaline) Let me have you identify some of these other things.

(Marked State's Exhibit No. 11 for identification.)

MR. DIMALINE: Can I have a second, Judge?

THE COURT: You may.

Q. (By Mr. Dimaline) Rudy, let me hand you what's been marked as State's Exhibit number 11. What is this?

A. That is Garibay's carrying bag.

Q. Garibay's carrying bag?

A. Yes.

Q. Is this what he was carrying that pistol around in?

A. Yes.

Q. That Bruce Fernandez used?

A. Yes, it was.

Q. Was this in the car that Jerry was driving the night that the robbery took place?

A. Yes, it was.

MR. DIMALINE: Your Honor, at this time we'd like to offer State's Exhibit number 11.

MR. FAHLE: Your Honor, we have no objection to State's Exhibit number 11 itself. It does have contents that have not been identified.

MR. DIMALINE: One of our officers will identify the contents.

MR. FAHLE: At that time I'll have no objection to them being admitted, Your Honor.

THE COURT: Do you want to take out the contents?

MR. DIMALINE: I can.

THE COURT: State's Exhibit number 11 will be admitted into evidence.

MR. DIMALINE: Your Honor, let me re-tender to defense counsel and offer it again.

MR. FAHLE: No objection, Your Honor.

THE COURT: State's Exhibit number 11

will be admitted into evidence; no objections.

Q. (By Mr. Dimaline) Do you know what kind of bullets were in that gun that Bruce Fernandez used?

A. No, I don't.

MR. DIMALINE: Can I have these marked, please, sir?

(Marked State's Exhibits 12 and 13 for identification.)

Q. (By Mr. Dimaline) I'm going to hand you what's been marked as State's Exhibit number 12. Can you identify that photograph?

A. Yes, I can.

Q. What is that a photograph of?

A. The two purses in the car.

Q. Was that taken on October 20th, 1994 as best you know?

A. Yes.

Q. Let me hand you what's been marked as State's Exhibit number 13. Can you identify that?

A. Yes, I can.

Q. What is that a picture of?

A. The car that we were in.

Q. Is that the way the car that you were in looked like on October 20th, 1994?

A. Yes.

MR. DIMALINE: Your Honor, at this time I'll offer State's Exhibits 12 and 13; tender them to defense counsel for his inspection and objection.

MR. FAHLE: May I take this witness on Voir Dire, Your Honor?

THE COURT: You may.

VOIR DIRE EXAMINATION

BY MR. FAHLE:

Q. Rudy, you said as to State's Exhibit 12 here, I'll show it to you. State's Exhibit 12 --

MR. FAHLE: Your Honor, may I approach the witness from time to time?

THE COURT: You may.

MR. FAHLE: Thank you.

Q. (By Mr. Fahle) That this was taken on the night that this happened as far as you knew.

A. Yes.

Q. But you don't have any personal knowledge of when this was taken, do you?

A. No, I don't.

MR. FAHLE: Your Honor, I would object to State's Exhibit 12 on the ground it's not been properly authenticated, and to State's Exhibit number 13 on the grounds that under Rule

403, on the grounds that it is more prejudicial than probative.

THE COURT: May I see it, please?

MR. FAHLE: I'm sorry, Your Honor.

THE COURT: State's Exhibit number 12 will be admitted into evidence. The defense objection will be overruled. State's Exhibit number 13 will be admitted into evidence. The defense objection will be overruled.

MR. DIMALINE: May I publish them to the jury?

THE COURT: You may.

DIRECT EXAMINATION RESUMED

BY MR. DIMALINE:

Q. For the record, we're looking at State's Exhibit number 12. What does this picture show, Rudy?

A. The two purses and the car that we were in.

Q. Is that State's Exhibits number 9 and 10 that have already been admitted -- 9 and 11 that have already been admitted in this case?

A. Yes.

Q. Is that the blue vehicle that you described as being Jerry's mother's car that you all were riding around in?

A. Yes, it is.

Q. For the record, we're looking at State's Exhibit number 13. Can you identify that? What vehicle is that?

A. That's the same vehicle that we were in.

Q. That's the light blue Dodge car that you all were riding in?

A. Yes, it is.

Q. What happened after the Terrell Hills police officer came to that scene at Austin Highway?

A. He just told them that we were involved in a robbery and had us arrested.

Q. So were you placed under arrest?

A. Yes, I was.

Q. Was Bruce caught that night?

A. No, he wasn't.

Q. Was anybody else arrested?

A. Carlos.

Q. And what happened to you and Carlos at that time?

A. We were -- they just put us in cop cars. We were just there for a while.

Q. Where did they take you?

A. To the Terrell Hills Police Department.

Q. Did you talk to a detective at that point?

A. When we got there, I didn't, not until later on in the night.

Q. Did you talk to a detective later en that night?

A. Yes, I did.

Q. And did you talk to him about your involvement in this case?

A. Yes, I did.

MR. FAHLE: Object to the hearsay, Your Honor.

THE COURT: Overruled.

Q. (By Mr. Dimaline) Did you also have some items that were taken?

A. Yes, I did.

Q. From you that were in that car?

(Marked State's Exhibit No. 14 for identification.)

Q. (By Mr. Dimaline) Let me have you identify State's Exhibit number 14. Does that look familiar?

A. Yes, it does.

Q. What is that?

A. My wallet.

Q. How can you identify this as being your wallet?

A. Because I have my medical cards in here, my social security and my ID.

MR. DIMALINE: Your Honor, at this time we'd like to offer State's Exhibit number 14.

(Marked State's Exhibit No. 15 for identification.)

MR. FAHLE: Your Honor, as to State's Exhibit number 14, we have no objection. As to the documents contained therein -- just a second, I just found another one. Some them have been identified, some have not. And as to the ones that have been identified, we have no objection. As to the ones that have not been identified, we object.

MR. DIMALINE: Let me have him identify them for the record, Judge.

THE COURT: Yes.

Q. (By Mr. Dimaline) Rudy, can you take your wallet, State's Exhibit number 14, and one by one identify all the documents therein?

A. This is a picture of my ex-girlfriend's baby. This was from my house when my mom had a photo book. And it had just -- I don't know what it was from, but she had it in a photo book.

Q. Okay.

A. These are the same, from my mom's photo book.

Q. What are those?

A. From when my dad was in the war. These are all paycheck stubs from my old job. And this is the deposit slip where I deposited money in the bank.

THE COURT: Could you speak up, son? I'm being told they can't hear you.

THE WITNESS: This was a friend of mine's phone number. This is a picture of my little brother. My military ID, my military medical card, and my social security card.

Q. (By Mr. Dimaline) Is that about it?

A. Yes. Yes, it is.

MR. DIMALINE: Your Honor, with those items identified, we reoffer State's Exhibit number 14.

MR. FAHLE: No objection, Your Honor.

THE COURT: State's Exhibit number 14 and the contents will be admitted into evidence; no objections.

Q. (By Mr. Dimaline) Can you describe the bandanna that Bruce Fernandez was wearing?

A. It was a dark-colored bandanna.

Q. Let me hand you what's been marked as State's Exhibit number 15. Can you identify what this is for the record?

A. A bandanna.

Q. Does this look similar to the bandanna that Bruce Fernandez used during the robbery that you saw?

A. I don't know because it was just dark, a dark color.

Q. Was it similar to this color?

A. Yes.

Q. This robbery that you participated in, aggravated robbery, was that committed in Bexar County, Texas?

A. Yes, it was.

Q. Within San Antonio?

A. Yes.

Q. Terrell Hills?

A. Yes.

Q. Okay. Did you give a statement to Detective Davis after this incident?

A. Yes, I did.

Q. And do you recall what time it was that Detective Davis took your statement?

A. It was real early, like around three or

four in the morning.

MR. DIMALINE: May I approach the witness?

THE COURT: You may.

Q. (By Mr. Dimaline) Let me hand you what's been marked as State's Exhibit number 3. Can you identify that?

A. Yes, I can.

Q. What is that?

A. A statement that I gave to the police officer at Terrell Hills.

Q. Can you look at State's Exhibit number 3 and refresh your memory as to when they took that statement from you?

A. Yes, I can.

Q. What time was it?

A. 4:56 in the morning.

Q. Did you agree to make a statement to Detective Davis?

A. Yes.

Q. Did you tell him the truth in that statement, State's Exhibit number 3?

A. No, I didn't.

Q. Why not?

A. Because at first I was scared at the time.

Q. What were you scared of?

A. I was scared because I didn't know how the law worked.

Q. Did you make a second statement that night to Detective Davis?

A. Yes, I did.

Q. Did you tell him the truth in the second statement?

A. Yes.

Q. Is that what you just testified to the jury to?

A. The what?

Q. The second statement.

A. Yes.

Q. Were you placed under arrest?

A. Yes, I was.

Q. What were you charged with?

A. Aggravated robbery.

Q. Did they book you?

A. Yes, they did.

Q. Did they take your picture?

A. Yes, they did.

MR. DIMALINE: May I approach the witness?

THE COURT: You may.

(Marked State's Exhibit No. 16 for identification.)

Q. (By Mr. Dimaline) Let me hand you what's been marked as State's Exhibit number 16. Can you identify that picture?

A. Yes, I can.

Q. Who is that a picture of?

A. Of me.

Q. Is that how you looked on October 20th, 1994?

A. Yes, it is.

MR. DIMALINE: Your Honor, we'd like to offer State's Exhibit number 16.

MR. FAHLE: No objection, Your Honor.

THE COURT: May I see it, please? State's Exhibit number 16 will be admitted into evidence; no objections.

MR. DIMALINE: May I publish it to the jury?

THE COURT: You may.

Q. (By Mr. Dimaline) Did they take you to jail for aggravated robbery?

A. Yes.

Q. Did they take your fingerprints?

A. Yes, they did.

Q. They set your bond?

A. At the Municipal Court, the magistrate there set my bond.

Q. Did you stay in jail for this?

A. Yes. For some of it.

Q. How long did you stay in jail?

A. For about three weeks.

Q. Did you make bond at that point?

A. Yes, I did.

Q. Were you awaiting trial in this Court on the charge of aggravated robbery?

A. Yes.

Q. Did you subsequently plead guilty in this case?

MR. FAHLE: Your Honor, leading the witness.

THE COURT: Overruled.

Q. (By Mr. Dimaline) Did you plead guilty to this case?

A. To this case?

Q. Yes.

A. Yes.

Q. To your involvement in this case you pled guilty?

A. Yes.

Q. When did that happen?
A. When did I plead guilty?
Q. Uh-huh.
A. Can you --
Q. What day? When was it that you pled guilty?
A. When did I plead guilty? Two days ago.
Q. On Monday, right?
A. Yes.
Q. When the case was set in here?
A. Yes.
Q. What did you plead guilty to?
A. To robbery.
Q. Prior to pleading guilty, did you agree to make yourself available to testify as a witness against Bruce Fernandez and Carlos Garibay?
A. Yes.
Q. Did you and your attorney come up to the District Attorney's office and talk to myself and Ms. Parker?
A. Yes, I did.
Q. Did we discuss your involvement in this case?
A. Yes.
Q. Did we take another statement from you?

A. Yes, you did.

Q. Do you know why the purpose of us taking another statement from you was?

MR. FAHLE: Speculative, Your Honor.

THE COURT: I beg your pardon?

MR. FAHLE: It calls for speculation.

THE COURT: Overruled.

Q. (By Mr. Dimaline) Do you remember why I told you?

MR. FAHLE: Your Honor, he's asking him now to repeat the prosecutor's out-of-court statements.

MR. DIMALINE: Let me rephrase.

Q. (By Mr. Dimaline) Why did we take that statement from you?

MR. FAHLE: Your Honor, this witness has no personal knowledge as to why they did anything.

THE COURT: Sustain the objection. Don't answer that question.

Q. (By Mr. Dimaline) Did you make another statement?

A. Yes.

Q. Why?

A. To cooperate with the State.

Q. Okay. Did you go into more detail in your statement?

A. A little more.

Q. And what's your understanding of your plea bargain in the case that you pled guilty to on Monday?

A. A maximum of ten years and the State no say-so on probation.

Q. You need to speak up. I can't hear you.

A. A cap of ten years and no say-so of probation.

Q. A cap of ten years and the State is remaining silent on your Application for Probation?

A. Yes, sir.

Q. And you understand it's up to the Judge to sentence you?

A. Yes.

Q. The agreement also includes that you testify truthfully; is that correct?

A. Yes.

Q. In this case and also in Carlos Garibay's case?

A. Yes.

Q. You've agreed to do that; haven't you?

A. Yes.

MR. DIMALINE: Judge, can we approach

for a second?

THE COURT: Yes.

(Conference at the bench.)

MR. DIMALINE: I think I need to obtain the original plea bargain agreement that's in the Court's file.

THE COURT: Okay.

MR. DIMALINE: Could we call for Lillian to bring that case in?

THE COURT: Tell Lillian to bring the file, or is it here?

MR. FAHLE: It's on his file.

THE COURT: I can't hear you.

THE COURT: A.J. and John.

MR. FAHLE: Yes, Your Honor.

THE COURT: I'm sure we can't get to your witness out there before noon.

MR. DIMALINE: We cut them loose already.

THE COURT: Huh?

MR. DIMALINE: I excused Mr. Morehouse until this afternoon.

THE COURT: Until after lunch. You still have to pass him for cross.

MR. DIMALINE: I apologize.

THE COURT: That's all right. But he still has to cross him.

MR. DIMALINE: Right.

(Marked State's Exhibit No. 17 for identification.)

MR. DIMALINE: Judge, can I proceed?

THE COURT: You may.

(Back before the jury.)

Q. (By Mr. Dimaline) Let me have you identify State's Exhibit number 2, a two-page document. What is that?

A. Another statement that I gave.

Q. Is that the second statement that you gave the Terrell Hills detective?

A. Yes, it is.

Q. And can you identify the three-page document marked as State's Exhibit number 1?

A. Yes, I can.

Q. What is that?

A. The statement I gave on Monday.

Q. On Monday who did you give that statement to?

A. To Investigator Burch.

Q. In the D.A.'s office?

A. Yes, I did.

Q. And State's Exhibit number 17 is a two-page document. What is that?

A. The terms of our agreement.

THE COURT: What's the number?

MR. DIMALINE: 17.

Q. (By Mr. Dimaline) Is one of the terms in State's Exhibit number 17 if the State feels that you're not testifying truthfully, we don't have any plea bargain; is that correct?

A. Yes, it is.

(Marked State's Exhibit No. 18 for identification.)

Q. (By Mr. Dimaline) Rudy, let me hand you what's been marked as State's Exhibit number 18. Can you identify that picture?

A. Yes, I can.

Q. Who's in that picture?

A. Bruce.

Q. Bruce who?

A. Bruce Fernandez.

Q. The Defendant in this case?

A. Yes.

Q. Is that how he appeared when he committed the robbery on October 20th, 1994?

A. Yes.

MR. DIMALINE: Your Honor, at this time we'd like to offer State's Exhibit number 18; tender to defense counsel for his inspection and objection.

MR. FAHLE: May we approach the bench, Your Honor?

THE COURT: You may.

(Conference at the bench.)

MR. FAHLE: Your Honor, State's Exhibit number 18 is a mug shot. They can't get a mug shot in. It shows him as a prisoner. It's absolutely forbidden. It's prejudicial. It's way more prejudicial than probative. It flies in the face of the presumption of innocence. They can't get a mug shot in.

THE COURT: You're objecting to it?

MR. FAHLE: That's the objection.

THE COURT: Objection overruled. State's Exhibit number 18 will be admitted into evidence. The defense objection is overruled.

(Back before the jury.)

MR. DIMALINE: May I publish it to the jury?

THE COURT: You may.

MR. FAHLE: Your Honor, could I just

ask if the court reporter got that objection? I was whispering.

(Marked State's Exhibit No. 19 for identification.)

Q. (By Mr. Dimaline) Rudy, I'm going to hand you a picture that's marked State's Exhibit number 19. Can you identify that?

A. Yes, I can.

Q. Who is that?

A. It's a picture of Jerry.

Q. Is that what Jerry looked like on October 20th, 1994?

A. Yes.

MR. FAHLE: Your Honor, he's already testified -- I'm sorry. I'll wait until I see it.

MR. DIMALINE: At this time we'll offer State's Exhibit number 19.

MR. FAHLE: Your Honor, could we approach?

THE COURT: You may.

MR. FAHLE: Actually, I'm sorry. Wait. I may be able to do this more quickly. Can I take this witness on Voir Dire briefly?

THE COURT: You may.

VOIR DIRE EXAMINATION

BY MR. FAHLE:

Q. You just testified --

MR. FAHLE: May I approach the witness?

THE COURT: You may.

Q. (By Mr. Fahle) Sir, you just testified that that's what Jerry looked like on -- I'm sorry. Give me the date again, October?

A. The 20th.

Q. Of 1994?

A. Uh-huh.

Q. Is that what you testified to?

A. Yes.

Q. But you didn't see him looking like that, did you?

A. Not like that.

Q. Okay. So you can't tell me if he looked like that on that day?

A. Not like that right there.

Q. You cannot tell me that. You can't say, you have no personal knowledge whether he ever looked like that?

A. What do you mean?

Q. Well, do you know when this picture was

taken?

A. No, I don't.

Q. Do you know -- did you see -- in other words, the prosecutor asked you if that's what he looked like on that day. He didn't look like that, did he?

A. He didn't look exactly like that.

Q. (By Mr. Fahle) This does not fairly and accurately represent the way he looked, that you saw him that day, does it?

A. No.

MR. FAHLE: Your Honor, I'd object.

MR. DIMALINE: Could I ask a few questions, Judge?

THE COURT: You may.

DIRECT EXAMINATION RESUMED

BY MR. DIMALINE:

Q. Does State's Exhibit number 19, depict similar facial features or the same facial features that Jerry Lopez had on that day?

A. Yes.

Q. What do you see in there that looks the same that you remember Jerry Lopez looking like on that day?

A. On that day? Just his beard, his

mustache, the way his face is shaped.

Q. Can you identify that? Is that Jerry Lopez?

A. Yes, it is.

Q. Are those the same facial features he had on October 20th, 1994?

A. Yes.

MR. DIMALINE: Your Honor, I'd reoffer State's Exhibit number 19.

MR. FAHLE: Your Honor, could we -- I'm sorry. Could we approach the bench on this?

(Discussion at the bench.)

MR. FAHLE: State's Exhibit number 19 is a picture of Jerry Lopez dead. It's a morgue photo that was taken after his death, apparently at the Medical Examiner's office. This witness -- I have several objections to this. One, it's more prejudicial than probative under 403. Two, it has absolutely nothing to do with the facts of this case.

THE COURT: The objection will be sustained.

MR. FAHLE: Thank you, Your Honor.

(Back before the jury.)

THE COURT: Objection sustained.

MR. DIMALINE: May I have a moment, Judge?

THE COURT: You may.

Q. (By Mr. Dimaline) Rudy, what time did this aggravated robbery take place?

A. I don't know. It was before midnight.

Q. Just before midnight?

A. Yes.

MR. DIMALINE: Your Honor, at this time I'll tender State's Exhibits 1, 2, and 3, which are the statements from this witness.

THE COURT: Identified by the witness.

MR. DIMALINE: This witness being Rudolfo Antonio Ybarra. And also State's Exhibit number 17, which are the terms of the plea bargain agreement, for the purposes of cross-examination, and pass the witness.

MR. FAHLE: May we have just a moment, Your Honor?

THE COURT: You may.

CROSS EXAMINATION

BY MR. FAHLE:

Q. Mr. Ybarra, again my name is John Fahle, and I represent, together with Suzanne Kramer we represent the Defendant in this case, Bruce Fernandez.

Sir, I don't have a lot of questions for you, but I do have a few. And again, we have not talked before about this case. We've not had the opportunity to meet and visit about this, have we?

A. No, we haven't.

Q. I will ask you, sir, if you could, to try to think about keeping your voice up so the jury can hear you during our exchange. I'll try to remind you if you start dropping down.

A. Okay.

Q. I have the same problem, I mumble.

MR. FAHLE: May I approach the witness, Your Honor?

THE COURT: You may.

Q. (By Mr. Fahle) I'm going to show you what has been marked as State's Exhibit --

MR. DIMALINE: It's 17. That was for the plea.

MR. FAHLE: I see.

MR. DIMALINE: No. Leave it on there.

Q. (By Mr. Fahle) I'll show you what's been marked as State's Exhibit number 17 and ask you if you recognize that.

A. Yes, I do.

Q. And it's marked twice. Once on the left

and once on the right, but on the left it's marked as State's Exhibit number 17; correct?

A. Yes.

Q. Can you tell me what that is?

A. It's the terms of our agreement.

Q. Terms of?

A. Of a plea bargain agreement.

Q. Of a plea bargain agreement that you entered into with the District Attorneys in this case; correct?

A. Yes.

Q. Can you tell me, looking at the back page, is this your signature?

A. Yes, it is.

Q. Okay. You were represented by an attorney; is that correct?

A. Yes, I am.

Q. Is that his signature here? Do you recognize his signature?

A. Yes, I do.

Q. Is that it?

A. Yes, it is.

Q. Also on the second page of Exhibit 17; correct?

A. Yes, it is.

Q. Do you recognize -- do you know who wrote that?

A. Yes, I do.

Q. Did you see them write it?

A. Yes, I did.

Q. Who was that?

A. The district attorney.

Q. The district attorney, Mr. Dimaline? That's his signature; correct?

A. Yes.

Q. Do you recognize this signature?

A. Yes, I do.

Q. Did you see that person write that signature?

A. Yes.

Q. Whose is that?

A. His assistant, Laura.

Q. It's Laura Parker, the other assistant district attorney sitting on this case. And then here, do you recognize this signature?

A. That's the first time I've seen it.

Q. Okay. So you do not know who wrote that?

A. I saw who wrote it.

Q. You have no personal knowledge as to who wrote it?

A. I saw who wrote it.

Q. I'm sorry?

A. Is that what you're trying to say? Yeah. I saw who wrote it.

Q. Who was that?

A. Judge Machado.

Q. Judge Machado in this case. Okay.

MR. FAHLE: Your Honor, I'd tender State's Exhibit number 17 into evidence.

MR. DIMALINE: No objections.

THE COURT: State's Exhibit number 17 will be admitted into evidence; no objection from the State.

Q. (By Mr. Fahle) Mr. Ybarra --

THE COURT: Can you hold everything for about two minutes, please. Nobody move for two minutes. I'll be right back. Two minutes.

(Brief recess.)

THE COURT: Okay. John, go ahead, please.

Q. (By Mr. Fahle) Mr. Ybarra, let's look at a couple -- this has been entered into evidence, State's Exhibit 17, which you've stated is your plea bargain agreement. And let's, if we can, look at a couple of terms of that agreement. Just a second.

Okay.

Mr. Ybarra, could you step down here for just a minute, please? Remember to speak up so that the court reporter can hear you and so that the jury can hear you. I just want to ask you a couple of questions about this. First it says: I, the undersigned Defendant, having had the advice of counsel, agree to the following. You were represented by a lawyer in this, correct?

A. Yes, I was.

Q. Do you think, looking at this plea agreement, do you fully understand everything and all it's implications of what it means?

A. Yes, I do.

Q. You do? Okay. Now, one of the things that you had to agree to in order to -- in order to get this deal -- by the way, how much time were you looking at? Did your lawyer tell you?

A. From what?

Q. For aggravated robbery.

A. Between five and 99 years.

Q. Twenty-five to 99 years? Is that what you said?

A. Between five and 99.

Q. Oh, five to 99 years. Okay. Did your

lawyer explain to you that you would have to do -- because it's an aggravated offense, you would have to do, actually do before you would be eligible for parole, you would have to actually do half that time?

A. Yes, he did.

Q. He did explain that to you?

A. Yes, he did.

Q. He explained that to you before you entered into this plea agreement; did he not?

A. Yes, he did.

Q. Now, let's go over the plea agreement. You will enter -- sorry. Let me go over here. You can stand over there and watch the screen. But it says you will give -- sorry. First you'll enter a plea of guilty to the offense of robbery of Jeffrey Morehouse; is that correct?

A. Yes.

Q. Have you done that?

A. Yes.

Q. You entered a guilty plea to this robbery?

A. Yes.

Q. When you did that, you were required to go before Judge Machado here, correct?

A. Yes.

Q. And you were sworn. You swore an oath; is

that correct?

A. Yes.

Q. And you then, and you swore an oath to tell the truth, just like the oath that you took here today?

A. Yes, I did.

Q. Okay. When you told the Judge then that you were -- and he asked you: Are you pleading guilty because you are guilty and for no other reason, right?

A. Yes.

Q. What did you say?

A. I told him yes.

Q. You told him that you were?

A. Yes.

Q. Try to speak up just a little bit. I think the court reporter might be having some trouble. Were you guilty of that offense?

A. Was I guilty of that offense?

Q. Yes.

A. Yes.

Q. Okay. Now, it then says -- sorry. Paragraph two, that you will give complete, full, complete and truthful testimony concerning my knowledge of any and all offenses committed by Bruce Fernandez and Carlos Garibay; correct?

A. Yes.

Q. And then further on down in the next paragraph. And I specifically agree to testify at the trials of Bruce Fernandez and Carlos Garibay concerning my knowledge of their participation and involvement in the commission of the aggravated robbery of Jeffrey Morehouse and the commission of criminal negligent homicide of Jerry Lopez.

A. Yes.

Q. And you agreed to testify against them?

A. Yes.

Q. Let's see if we're on the screen at all. Next it tells what they're going to do for you, right? What the State is going to do for you in exchange for entering a plea of guilty.

A. Yes.

Q. Okay. And it says: It is -- sorry. In return and in consideration thereof, the State of Texas agrees that the State shall have the right to make any recommendations concerning punishment at the sentencing phase subject to the limitations contained in paragraph nine. Right? What does that mean to you?

A. If I'm not truthful, they can --

Q. Okay. I'm sorry. Let's just real quickly

look at paragraph nine and see what those limitations are. Paragraph nine says that: In the event -- can you see that, paragraph nine? Is it up on the screen?

A. Yes.

Q. Okay. In the event that Rudolfo Ybarra faithfully fulfills his obligations, the State shall inform the Court of same and recommend the following: That Rudolfo Ybarra shall be sentenced to a cap of ten years imprisonment for the offense of robbery of Jeffrey Morehouse; is that correct?

A. Yes, it is.

Q. So there's a cap there, right?

A. Yes.

Q. Has your lawyer explained to you what a cap is?

A. It's like a maximum.

Q. It's a maximum. And the Judge has to follow that cap; is that correct?

A. Yes.

Q. Is that your understanding?

A. Yes.

Q. That you cannot receive more than ten years, right?

A. Yes.

Q. Now, however, it does say: But the State

can make -- back here in paragraph five, that the State can make any recommendations concerning punishment at the sentencing phase, subject to only that limitation. That is, they can't make a recommendation for more than ten years, right?

A. Right.

Q. But they can make one for less. Is that your understanding?

A. Yes.

Q. Okay. Now, the other point is, however, and you brought this up, if they don't think you're telling the truth, that's it, right?

A. Yes.

Q. Okay. And that is under paragraph -- I'm sorry. Is that up on the screen, paragraph six here? Do you see that on the screen?

A. Yes.

Q. Okay. The State of Texas, by and through the Bexar County Criminal District Attorney's office, shall be the sole arbiter of Rudolfo Ybarra's good faith in the fulfillment of this agreement. Do you know what that means?

A. That they will decide if I fulfill it.

Q. That they will decide. Is that what you said? Speak up just a bit.

A. Yes.

Q. And that they will be the only ones to decide?

A. Yes.

Q. Speak up just a bit. Try to keep your voice up. It's kind of hard when we're over here.

A. Yes.

Q. Okay. Next, the Court shall -- and so the Court shall defer a determination of guilt and the sentencing phase in the above referenced cause numbers -- sorry -- in the above referenced cause numbers -- it says in all of the above referenced cause numbers, shall be postponed until such time as Rudolfo Ybarra has had the opportunity to comply with his obligations under this agreement through the completion of the trials against Bruce Fernandez and Carlos Garibay referred to in paragraph three above, right?

A. Yes.

Q. What does that mean?

A. That means that they're going to hold off on mine until if I fulfill my agreement, then they'll go and investigate on mine for my punishment phase.

Q. Okay. So that's after you've testified, correct?

A. Yes.

Q. All right. One other important thing down here in paragraph nine -- this is real important, isn't it? Especially to you. Paragraph nine B. One of the things the State has to do, the State shall remain silent to Rudolfo Ybarra's application for community supervision and deferred adjudication. What does that mean?

A. That means that the State will have no objections towards me applying for probation.

Q. Okay. And what generally has your lawyer told you what that means, the fact that they have no objection to it? What effect will that have?

MR. DIMALINE: Your Honor, I'm going to object. That is a misstatement of the plea bargain agreement. It's not we don't have any objections. We're being silent to his application.

MR. FAHLE: I apologize. I'm sorry, Your Honor. I'll rephrase it.

MR. DIMALINE: There's a big difference I think the jury needs to understand.

MR. FAHLE: That the State shall remain silent.

THE COURT: I sustain the objection. You understand what happened. The State to

remain silent.

Q. (By Mr. Fahle) Has your lawyer explained to you what the effect of that is?

A. Yes.

Q. What does it mean in practical terms?

A. In practical terms, that the State won't say anything if I apply for probation.

Q. Okay. Has your lawyer explained to you whether the State ever actually recommends probation?

A. No.

Q. Your lawyer has not explained that or they do not?

A. What do you mean? Like --

Q. Do you know, through your lawyer or through anyone else, whether or not the State actually affirmatively says, yeah, we want him to get probation, or do they just say we'll remain silent?

A. Well, I don't really no.

Q. You don't know? Okay. Then the last thing, paragraph A, should Rudolfo Ybarra fail to fulfill his obligations under this agreement as determined by the State, right? The State shall inform the Court of such failure, the said Rudolfo Ybarra's plea shall be voided and withdrawn, and the parties shall be returned to their positions prior to

Rudolfo Ybarra entering his plea of guilty. It is specifically agreed that Rudolfo Ybarra shall be subject to prosecution for aggravated robbery with a deadly weapon; is that correct?

A. Yes.

Q. That's what that says?

A. Yes.

Q. What's your understanding of what that means?

A. That if I don't fulfill my point of the agreement, that the plea that I signed for will then be taken out and I'll be charged with aggravated robbery.

Q. Then we still have your cap of ten?

A. No.

Q. In fact, you'll be back to facing 99 years in prison?

A. Yes.

Q. Correct? And that's if you don't fulfill your agreement, the terms of the agreement.

MR. DIMALINE: Your Honor, I'm going to object to him --

THE COURT: Just a minute.

MR. DIMALINE: -- marking on that. It's already been admitted.

MR. FAHLE: Your Honor, I think the State was permitted to do that. I think I should be permitted to do the same.

THE COURT: The objection is overruled.

MR. FAHLE: Thank you, Your Honor.

Q. (By Mr. Fahle) So, as determined by the State, correct? So, now, this is where it gets interesting because I want to know your perception on this. What if you told the truth but the State didn't believe you, even if it were true?

A. Then I'll get charged with aggravated robbery.

Q. They can bust your deal, right?

A. Yes.

Q. And you'll be right back where you started?

A. Yes.

Q. Even if you told them the truth, if they don't think it's the truth, you can be charged?

A. Yes.

Q. Okay. And again, back there on page one, that the State of Texas, by and through the Bexar County Criminal District Attorney's office, shall be the sole arbiter of Rudolfo Ybarra's good faith in the

fulfillment of this agreement, correct?

A. Yes.

Q. So it's not like you get to go to the Judge and say, well, Judge, I didn't lie; they think I'm lying, but I didn't lie, right?

A. Right.

Q. The Judge gets informed, but they're the ones that ultimately decide?

A. Yes.

Q. So if you don't testify the way they want, basically, your deal is busted?

A. - The way they want?

Q. Yeah.

A. I'm testifying about what I know.

Q. Okay. But if what you knew didn't happen to agree with what they thought they knew, then your deal would be busted. Is that right? Even if you told the truth?

A. Yeah.

Q. I'm sorry?

A. Yeah.

MR. DIMALINE: Your Honor, I'm going to object. That's the purpose of us taking the statement, for us to hold him to his statement. And I think he's misleading the jury about --

THE COURT: I sustain the objection. Disregard that, members of the jury, please. Please disregard that.

MR. FAHLE: Your Honor, am I to understand that I will not be allowed to ask this witness what his interpretation of that plea agreement is and what the effect of his lying on the stand would be?

THE COURT: No. You're permitted to do that, but the statement you made awhile ago about what the State would do even if -- I can't make a comment on the evidence.

MR. FAHLE: But it's his perception that matters, Judge. It's not what the State would actually do, it's what he thinks they would do. It goes to his bias or motive.

THE COURT: That's not the question you asked him.

MR. FAHLE: I'm sorry. The question I asked him was, and if I got this wrong -- can I try it again, maybe I'll --

Q. (By Mr. Fahle) If the State -- if you tell the truth but the State thinks that you're lying, they can bust your deal.

MR. DIMALINE: Well, Your Honor, I'm

going to object. That's the whole purpose of why we took the statement so that we would know if he's telling the truth or not. That's what we're holding him to under this agreement.

MR. FAHLE: Judge, that goes to the weight. The admissibility -- the issue -- if I can't examine this witness on his motive or bias for testifying, I don't know why we're having a trial.

THE COURT: You can question him, but the statement you're making about the State.

MR. FAHLE: No. It's not about the State. It's his perception of what the State would do, Your Honor. That's what matters. It's his motive to testify.

THE COURT: What did you say about the State thinking, he meant.

MR. FAHLE: What I said was, if the State -- if he testifies truthfully but the State thinks he's lying --

THE COURT: That's the part.

MR. FAHLE: All right. Then let me ask it this way. May I try one more time, Your Honor?

THE COURT: You may. But remember,

you're getting into the State's mental capacity there.

MR. FAHLE: You're right, Your Honor.

Q. (By Mr. Fahle) Is it your understanding of this plea agreement that if you testify truthfully but the State thinks you're lying, that they can then bust your deal?

A. Yes.

Q. Thank you. You can be seated. Well, hang on just a second. Let me see what else I want to do on the documents.

Okay. Showing you what's been marked as State's Exhibit number 2, and that's your voluntary statement made on the 21st, October 21st, 1994; is that correct?

A. Yes.

Q. You've already identified this document and your signature on that document; is that correct?

A. Yes.

MR. FAHLE: Your Honor, we'd move for the admission of State's Exhibit 2.

MR. DIMALINE: May I --

MR. FAHLE: I'm sorry.

MR. DIMALINE: Judge, can we approach the bench?

THE COURT: You may.

(Discussion at the bench.)

MR. DIMALINE: We won't object to State's Exhibit number 1 if they don't object to State's Exhibit number -- We won't object to State's Exhibit number 2 if they don't object to us offering State's Exhibit number 1.

THE COURT: Let's do this. It's getting close to 12:00. Let's recess for lunch.

MR. FAHLE: Okay. Your Honor, I have a problem. At 1:30 I have oral arguments scheduled in the Court of Appeals.

THE COURT: There's lead counsel.

MR. FAHLE: Yes, Your Honor, but we've already started this witness.

THE COURT: How late do you think you'll be up there?

MR. FAHLE: I think it will be just 20 minutes a side.

THE COURT: See you at 2:00. If you can't get here at 2:00, we'll wait for you.

(Back before the jury.)

THE COURT: Members of the jury, we're going to recess for lunch. I'll see you back at 2:00 o'clock. I hope and trust you have a nice

meal. Please remember the admonition. Must I repeat it? No? You're excused until 2:00 o'clock.

(Recess.)

THE COURT: Please have a seat. Okay. Your witness, Suzanne.

MS. KRAMER: May I approach the witness, Your Honor?

THE COURT: You may.

Q. (By Ms. Kramer) Mr. Ybarra, I've not spoken with you yet. I'm Suzanne Kramer. I also, along with John Fahle, represent Mr. Fernandez. I just have a couple of more questions for you.

Okay. On this statement that was given -- and two statements both say that they were given at the same date at the same time. So I actually don't know which one occurred first. But these are the two that you gave down at Terrell Hills.

A. Yes.

Q. Okay. On one of them you've already testified this is your signature and you were under oath. You've already testified to that. What I would like to get into that we ran out of time this morning to get into is this: You swore when you made this statement, this voluntary statement, that you were

telling the truth and everything in here was the truth; is that correct?

A. What do you mean I swore?

Q. You swore that this, by signing, that this statement that you gave down at the Terrell Hills --

A. Earlier?

Q. At Terrell Hills Police Department.

A. Terrell Hills?

Q. The night, or actually the morning after this occurred, that this was the truth.

A. I didn't swear for that. I just signed it.

Q. You didn't swear to anyone that this was the truth and nothing but the truth and this was a true statement?

A. The only thing I swore on that was the day that I gave these statements.

Q. At the time that you gave these statements, all of these warnings were read to you and you initialed them. Are these your initials?

A. Yes, they are.

Q. So you understood that you were making a statement to the police as to the events that occurred that night?

A. Yes.

Q. Okay. And at no point in time -- you're asking this jury -- your telling this jury that at no point in time when you made this statement that you were swearing that it was the truth?

A. They didn't have me swear that it was true.

Q. Okay. However, you did testify this morning that this, in all actuality, was not the truth?

A. Yeah.

Q. This statement is not the truth. What I would like to ask you then, if this is not the truth, can you please tell me why you didn't tell the truth at the time? Was it because nobody told you that you had to, or did you have another reason?

A. I had another reason.

Q. What was that reason?

A. First, I was covering up for a friend.

Q. Okay. So you lied in this one?

A. Yeah.

Q. Then we have this one that you made at the District Attorney's office just the other day.

A. Yes.

Q. Now, when you made this statement, were you told that this was the truth, you were telling

them the truth? This was the truth?

A. Yes.

Q. Now, what I would like to know, if you could explain to me, please, if this is not the truth and you want the jury to believe that this statement that you gave Monday is the truth, why should we believe you? What if you were covering up? The reason that you said that you lied in this one is because you were covering up for a friend.

A. Yeah.

Q. How do we know that you're not lying in this one so that you can get ten years instead of 99, possibly probated? How do we know that?

A. How?

Q. Yes.

A. Because if you look at the other statement, you see that it has -- the second statement I gave to the police, it says just about the same thing as that one.

Q. Yes, but you did not tell the truth one time for a reason and covering up for a friend -- if you could agree with me -- this is a question -- would you agree that covering up for a friend is not nearly as good a motivation to lie as saving yourself a lot of time in prison? So why should we believe this

statement that gave to the District Attorney's office?

A. Why?

Q. Yes.

A. Because it's the truth.

Q. So you say.

MS. KRAMER: No further questions.

MR. DIMALINE: I don't have any further questions.

MS. KRAMER: He can be excused, Your Honor.

THE COURT: Thank you, sir. You're excused.

MR. DIMALINE: Your Honor, may this witness be excused?

THE COURT: Yes.

MS. KRAMER: I cannot imagine recalling him.

MR. DIMALINE: Subject to being recalled for rebuttal?

THE COURT: Yes. Next witness?

MS. PARKER: The State calls Diana Morehouse.

THE COURT: Please have a seat, Mrs. Morehouse. After you have a seat, raise your right hand.

(Thereupon the witness was sworn by the Court.)

* * * * * *

DIANA TOWNSEND MOREHOUSE,

The witness, after having first been cautioned and duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

DIRECT EXAMINATION

BY MS. PARKER:

Q. Mrs. Morehouse, could you please tell the jury your full name?

A. My name is Diana Townsend Morehouse.

Q. Can you spell your last name for the court reporter?

A. M-O-R-E-H-O-U-S-E.

Q. Where do you live?

A. I live at 201 Morningside Drive.

Q. Where is that located?

A. Terrell Hills.

Q. Is that here in Bexar County?

A. Yes.

Q. Can you tell the jury a little bit about yourself? Are you from San Antonio?

A. Yes. I was born and raised and educated here.

Q. What kind of work do you do?

A. I'm a real estate agent with Phyllis Browning Company.

Q. I would like to direct your attention back to October 20th of last year, 1994. Can you tell the jury what you were doing during that day? Do you recall?

A. We were involved in a charitable organization function that night and we were working on the function during the day. And then --

Q. What function was that?

A. It's the Chrysanthemum Ball. It raises funds for children's charities in Bexar County.

Q. Did you go to the party that night?

A. Yes, we did.

Q. Where was that?

A. It was at La Villita Assembly Hall.

Q. About what time did you leave that party?

A. I think we left around 11:30.

Q. What kind of car do you have?

A. We were driving a Cadillac Seville.

Q. Is it a new model Cadillac?

A. At that time it was pretty new to us. It was a 1993.

Q. What color is it?

A. It's gray.

Q. Can you tell the jury the route that you took when you left La Villita that night?

A. We came home down Broadway. And from Broadway we turned on the Austin Highway, which is kind of a back route to our house.

Q. Did you turn to the right or the left?

A. We turned to the right heading north towards Austin. And then we turned right on Sheraton, which put us just about at our back driveway.

MS. PARKER: Your Honor, may I approach the witness?

THE COURT: You may.

Q. (By Ms. Parker) Mrs. Morehouse, I'm going to show you a map which has been previously marked and admitted as State's Exhibit, I think it's number 5. If you can look at it first and orient yourself with where your house would be on that map, this being Broadway, this being the Austin Highway.

A. Okay. So here's Sheraton. Uh-huh. So we came up Broadway and we veered to the right on the Austin Highway, and then we headed here. This is where Sheraton crosses, and our house is located right here at the corner of Morningside and Sheraton, and our driveway comes off right here.

Q. Okay. I'm going to turn this. If you can just point on this map so the jury can see.

A. We came up Broadway and we veered to the right on the Austin Highway, and then we turned right on Sheraton here, and our house is located at this intersection of Morningside and Sheraton, and we turned into our driveway right about here.

Q. Okay. How were you all dressed for this party?

A. It was a formal party, and my husband had on a tuxedo and I had on an evening dress.

Q. Did you notice anything unusual as you were driving home that night?

A. Nothing whatsoever.

Q. What happened when you pulled into your driveway?

A. Well, we pulled into the driveway and we pulled into the right-hand side. It's a two-car garage. And I got out on the passenger side and my husband got out on the driver's side. I had my hands full of notebooks with all my notes, because I had fairly responsible job with the party, and I also had a purse that was a daytime purse. It was just in the car, and I was just taking it in with me. My arms were all full of things. As we got out and I stood on

the right-hand side of the car and he stood on the left-hand side of the car, a man ran into the driveway and yelled at us, "Give me your money, you mother fucker," and was very aggressive towards us. He was waving a gun. He had a gun in his hand and --

Q. Can you tell me what the gun looked like?

A. It was just a big gun. I mean, I don't know anything about guns. It was just a pistol, I guess.

Q. Okay. Do you remember if it was black or chrome?

A. I guess.

Q. Can you demonstrate for the jury how he held it on you?

A. He held it straight out. He held it in his left hand and he had it turned sideways like that, so it was really right out at us.

Q. It wasn't straight on like at a firing range?

A. It was like this.

Q. With his hand to the side?

A. Yes.

MS. PARKER: Okay. May I approach the court reporter?

THE COURT: You may.

Q. (By Ms. Parker) Mrs. Morehouse, I'm going to turn on this video monitor. If I could direct your attention over here. If you can take that pointer that's right in that little thing right there.

A. Uh-huh.

Q. And with the Court's permission, if you could step down from the stand for a moment. Can you show the jury -- this is State's Exhibit number 8, which has already been admitted into evidence -- which side of that is your garage?

A. That's our garage, and this is Sheraton Drive. Back here is the Austin Highway. So we came in this direction and pulled in right here on the right-hand side of the two-car garage.

Q. So your garage is not that close to your house?

A. No. There's a breezeway here.

Q. It's fairly hidden from view. There's some bushes there?

A. Correct. There's a big hedge right here. And also another one here.

Q. You actually pulled into the driveway?

A. We were inside the garage.

Q. You may have a seat. Can you describe the man that held the gun on you?

A. I couldn't see his face. He had like a dark knitted cap and something across his face. But I can tell you that he was slender and about medium height. Not real tall. Like maybe five-seven, five-eight, something like that. And he seemed to be olive skinned. But I couldn't see his face.

Q. Could you tell anything about him from his accent?

A. I really didn't notice. I just more noticed his body build and his skin color.

Q. What did he take from you and your husband?

A. When he said to my husband, "Give me your money, you mother fucker," my husband pulled -- he carries this money clip, and he handed it to him. And then he said to me something like, "Give me your purse." So I just handed him the black purse that I had that was about this big that had been in my car.

Q. Did he take these things without your permission?

A. Yes.

Q. And were you afraid that he was going to either hurt you badly or kill you?

A. We were very, very terrified. In fact, I tried to scream. I don't know if any noise came out.

Q. How was the gunman acting? Did he seem nervous or excited?

A. Yes. Yes.

Q. Did he seem like a young person to you?

A. Uh-huh. We were sort of afraid to look in his face because you didn't want to get him more nervous or more excited.

MS. PARKER: Your Honor, may I approach the witness?

THE COURT: You may.

Q. (By Ms. Parker) Mrs. Morehouse, I'm going to show you what has been marked as State's Exhibit number 9. I'm going to ask you, is this the purse that was taken from you that night?

A. Yes.

Q. Do you recall what, if anything, was in it when it was taken?

A. There wasn't a wallet in it. I had taken my wallet out. There was just general pencils, business cards, and probably lipsticks or something. He just shook it out on the middle of the driveway. And pretty much right after that he ran off.

Q. Okay.

A. With the purse and the money clip.

Q. What kind of money clip was it?

A. I'm not sure exactly. I think it was probably a gold money clip, but I'm not sure.

Q. Let me ask you, I'm going to show you what have been marked as State's Exhibit number 10 for identification purposes. Are these your business cards?

A. Those are my business cards.

Q. And if they came out of that purse, and are they the ones that were taken that night?

A. I'm certain they are.

Q. Does that look like about how many were in the purse that night?

A. That would be about right.

MS. PARKER: Your Honor, at this time we would offer State's Exhibit number 10, which are the business cards, into evidence.

MS. KRAMER: We have no objection to this, Your Honor.

THE COURT: I beg your pardon?

MS. KRAMER: No objection.

THE COURT: No objection? State's Exhibit number 10 will be admitted into evidence; no objections.

Q. (By Ms. Parker) Mrs. Morehouse, when you say this gunman had his face covered up, is it

possible that he had a bandanna around the lower part of his face?

A. Yes. Something like that.

Q. Was it dark in color?

A. Yes. It seemed to be dark colored.

Q. What happened after this guy took your purse and your husband's money?

A. He ran down our side yard toward the corner of Morningside and Sheraton. And I ran in the breezeway trying to get into the house as fast as I could to just get out of danger. And my husband sort of ran into the yard looking to see which way he went. I heard two shots fairly close together.

Q. How long was this after the gunman ran into your side yard?

A. Just a very short while.

MS. PARKER: Your Honor, may I approach the witness?

THE COURT: You may.

(Marked State's Exhibits Nos. 20, 21 and 22 for identification.)

Q. (By Ms. Parker) Mrs. Morehouse, I'm going to show you what has been marked for identification purposes as State's Exhibit number 20 and ask you if

you recognize that.

A. That's the front of our house.

Q. Did it look that way back on October 20th of 1994?

A. I think so.

Q. Except it was night at that time?

A. Correct.

Q. And these are daylight pictures?

A. That's right.

Q. And State's Exhibit number 21, what is that a picture of?

A. That's the Sheraton side of our house.

Q. Did your house appear as it does here on October 20th, 1994?

A. Yes.

Q. Let me show you State's Exhibit number 22, and can you tell me what that is a view of?

A. That's a view from the intersection of Morningside and Sheraton back towards the Austin Highway.

Q. Does this appear as the intersection did on October 20th, 1994?

A. Yes.

MS. PARKER: Your Honor, at this time I would offer State's Exhibit 20, 21 and 22 into

evidence.

MS. KRAMER: No objection.

THE COURT: State's Exhibit number 20, 21 and 22 will be admitted into evidence; no objections.

Q. (By Ms. Parker) If I can get you one more time to step down while I put these on.

A. Do you want me to take this pointer?

Q. Yes. If you'll step down and show the jury with the pointer, after the man robbed you, if you can show them where he ran in relation to where your garage is. And then this other view on the corner of Sheraton and Morningside.

A. Okay. He ran into this part of our yard, across here and out towards the Morningside side of our house.

Q. And about where would he have been when you heard the shot?

A. Well, I was in here and I couldn't see him, but I assumed he was over in the front part of the yard somewhere, but I'm not sure.

Q. Let me show you State's Exhibit number 21. Is that the corner view of your house?

A. Yes.

Q. So you have a very long kind of driveway

that goes around the side?

A. That's right.

Q. Okay. So when he ran, he ran towards Morningside?

A. Yes. And I was back over here, so I couldn't see exactly where he was. But I could certainly hear the shots.

Q. Okay. Was there one shot and then an interruption and then another, or did they both go off together?

A. There was one shot. Then a minute or two later there was another shot.

Q. Okay.

A. And I remember yelling at my husband, "Get down," because I thought maybe he was shooting at us, but I couldn't see. I had no line of vision.

Q. Where did your husband go to after you all were held up?

A. Well, he was out here, and soon afterwards, or somewhere along in there, a Terrell Hills policeman came over driving along.

Q. Which road was he driving on?

A. He came in from the Austin Highway.

Q. Down Sheraton?

A. I believe so.

Q. Did you ever see that police car?

A. No.

Q. You can go ahead and have a seat. Can you remember where you heard the second shot coming from? Did it sound like it was the same area or some area a little farther off?

A. I'm not sure exactly. It could have been back towards -- I think they came back around. And I'm not sure exactly where it happened -- where it came from. I could just hear the second shot.

Q. Did you ever see the getaway car?

A. No, I didn't.

Q. Did you hear it come by or anything?

A. I was too afraid. I was trying to get in the house. I didn't see it.

Q. How did this whole thing make you feel?

A. We were just terrified. I mean, I just feel lucky to be alive.

Q. What's it like for you now when you drive into your garage late at night?

A. We're much more cautious. We try to not go up the Austin Highway. We try to drive through Terrell Hills so we'll notice if somebody is following us.

MS. PARKER: Thank you very much.

Q. (By Ms. Parker) Oh, let me ask you one other thing. Did you make a statement to the police in connection with this robbery?

A. Yes, I did.

(Marked State's Exhibit No. 23 for identification.)

Q. (By Ms. Parker) Before I ask you about your statement, do you see the man that is seated to the right of me with the short dark hair and the gray suit on?

A. Yes.

Q. Do you know him?

A. No.

Q. Do you know anybody by the name of Bruce Fernandez?

A. Only that that is the name of the person that supposedly did this.

Q. Okay.

MS. PARKER: Your Honor, would it be possible for you to instruct the Defendant to stand up so that Mrs. Morehouse can get a look at his build?

THE COURT: Stand up, Mr. Fernandez.

MS. PARKER: Could you ask him to step out to the middle of the courtroom and take his

coat off?

Q. (By Ms. Parker) Mrs. Morehouse, look at this individual --

THE COURT: Turn around, son.

Q. (By Ms. Parker) Looking at this individual standing in the middle of the courtroom, does he appear to be about the same size and build as the person who robbed you at gun point that night?

A. Yes.

Q. Thank you. You gave a statement to the Terrell Hills police?

A. Yes, we did.

THE COURT: Are you through with him?

MS. PARKER: Yes. I'm through.

Q. (By Ms. Parker) I'm going to show you what's been marked for identification purposes as State's Exhibit number 23 and ask you if this is a copy of that statement.

A. Yes, it is.

Q. Does it have your signature at the bottom, the end?

A. That is my signature.

Q. Okay. Thank you.

MS. PARKER: Your Honor, I'll pass the witness and tender State's Exhibit number 23 to

defense for cross.

MS. KRAMER: Just one moment, Your Honor.

THE COURT: Yes.

MS. KRAMER: No questions, Your Honor.

THE COURT: Thank you, Mrs. Morehouse. You're excused. Have a nice day.

THE WITNESS: Thank you, Judge Machado.

MS. PARKER: May this witness be excused?

THE COURT: I just excused the lady.

MS. KRAMER: Your Honor, we would like to keep her on call in case we need her.

MS. PARKER: Your Honor, we know how to contact her and we'll be happy to do that.

THE COURT: Make sure she can get hold of you.

MS. KRAMER: That's fine. Thank you.

THE COURT: Next witness.

MS. PARKER: The State calls Jeffrey Morehouse.

THE COURT: Please have a seat. After you have a seat, raise your right hand.

(Thereupon the witness was

sworn by the Court.)

* * * * * *

JEFFREY MOREHOUSE,

The witness, after having first been cautioned and duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

THE COURT: Your witness.

MS. PARKER: Thank you.

DIRECT EXAMINATION

BY MS. PARKER:

Q. Mr. Morehouse, could you please tell the jury your full name?

A. It's Jeff Morehouse.

Q. Can you spell your last name for the Court reporter?

A. M-O-R-E-H-O-U-S-E.

Q. What kind of work do you do?

A. I'm an attorney.

Q. Are you from San Antonio?

A. I'm from San Antonio.

Q. Okay. Where do you live?

A. I live at 201 Morningside.

Q. What part of town is that in?

A. It's in Northeast side.

Q. Is that here in Bexar County?

A. Yes, it is.

Q. Okay. I want to direct your attention back to October 20th of last year, 1994. Can you tell me what you were doing on the evening of October 20th?

A. My wife and I had gone to a charity ball party.

Q. What charity was that?

A. It's her charity.

Q. It's her thing? Okay. Where was the party?

A. It was down at the La Villita Center.

Q. About what time did you leave?

A. We left probably around 11:00 o'clock, you know, a little after 11:00 in the evening.

Q. Can you tell the jury the route you would have taken to get home that night?

A. Yeah. We came down Broadway and then came up Broadway and then turned on Austin Highway going north, and went across New Braunfels going up Austin Highway, and then turned on Sheraton.

Q. Would you have driven in front of the HEB there on Broadway in Alamo Heights?

A. Oh yeah.

Q. What kind of car were you all in?

A. We were in a '93 Cadillac Seville.

Q. What color was it?

A. It was gray.

Q. What were you wearing to the party that night?

A. I was wearing a tux.

Q. Did you notice anything unusual as you were driving home?

A. Not a thing. Just usual cars and stuff.

Q. Is that your normal route to go home, at that time, to go up Austin Highway and turn on Sheraton?

A. Sure.

Q. What happened when you got there?

A. We pulled off of Austin Highway onto Sheraton, and it's about a little less than -- it's a couple of houses down from where I live. There's only one house in between. We pulled into the garage. And I have an open two-car garage and --

Q. Which side did you pull into?

A. The right side.

Q. Did you pull all the way into the garage?

A. Pulled all the way into the garage. We have a light, automatic light that comes on as you drive in, and that came on. And then we were unloading the car. There were some things in the back

and things that my wife had at the party. And I was in between two cars when this young man ran up with a gun.

Q. Can you tell us what the young man looked like?

A. Well, you couldn't really see any facial features because he had a mask on. He had kind of, either a ski mask, kind of a black, he was dressed basically black. And he had a gun, automatic gun in his left hand.

Q. What color was the gun?

A. Blue. It wasn't chrome, it was blue.

Q. Dark gun?

A. Dark gun. Black gun.

Q. Do you know much about guns?

A. Yeah, sure. Well, I'm not an expert.

Q. You've seen some?

A. I've got guns.

Q. Was it a semi-automatic or revolver?

A. It was an automatic.

MS. PARKER: Your Honor, may I approach the witness?

THE COURT: You may.

Q. (By Ms. Parker) Mr. Morehouse, I'm going to show you what's been marked as State's Exhibit

number 4, and ask you if you'll take a look at this and tell us if it looks similar to the gun that that man held on you that night?

A. Yes.

Q. Can you tell the jury how he held it on you?

A. He held it in his left hand and he held it sideways.

Q. Okay. Did he say anything to you when he held the gun on you?

A. Yeah. He ran in. It kind of took me by surprise. I thought it was a prankster or something. But he ran in saying, "Give me your money, mother fucker."

Q. Did you give him your money?

A. Oh yeah. Yeah. Sure did.

Q. Did you give him anything else?

A. Basically I had a money clip and three or four hundred dollars.

Q. What kind of money clip was it?

A. It was a square gold, pretty plain money clip.

MS. PARKER: Your Honor, could I have just a minute?

(Marked State's Exhibit No.

24 for identification.)

Q. (By Ms. Parker) Mr. Morehouse, I'm going to show you what's been marked as State's Exhibit number 24 for identification purposes, for identification purposes. Is this your money clip?

A. No.

Q. Okay. So if it was recovered at the scene that night it belonged to somebody else?

A. If it was, it wasn't mine.

Q. Did he take anything from your wife?

A. Yes. A purse.

Q. Let me show you State's Exhibit number 9. Is this the purse he took from your wife?

A. Yes, it is.

Q. Okay. Was this purse recovered that night?

A. Yes.

Q. How do you know?

A. It was in the car.

Q. Okay. Did you see the car that these guys were driving?

A. Uh-huh. Yes.

Q. What kind of a car was it?

A. It was, if I remember correctly -- well, it was a four-door car. It was blue or grayish blue.

It was a smaller variety, maybe either a Chevelle or Toyota or something like that. It wasn't a big four-door. It was a smaller car.

Q. When was the first time that you saw this car?

A. Well, after I -- after he took off, I walked out of the garage. My wife headed for the front, you know, the back door. And I walked out in the backyard. And there's a police officer driving, came up Sheraton. And then the car pulled up right at the corner where the police car was.

Q. Which direction was the car pulling up from, the blue car?

A. It was going -- it was going west on Morningside.

Q. Okay. And then which way did it turn?

A. It turned north on Sheraton.

Q. Is that going back towards the Austin Highway?

A. Right.

MS. PARKER: May I approach the witness?

THE COURT: You may.

Q. (By Ms. Parker) Mr. Morehouse, I'm going to show you State's Exhibits 12 and 13, and ask you if

you can tell from these photos whether or not that was the same car that drove by your house to pick up the Defendant that night.

A. Well, this is obviously my wife's purse, but, yeah, it looks like -- it is the same car. It's four-door.

Q. When this police officer drove by your house as the suspect was running off, did you yell at him?

A. Yeah. I yelled at the police officer, but his windows must have been rolled up or something. But he, the young man jumped in the car.

Q. Could you tell which door he jumped in?

A. It looks like it was the passenger side in the back. I believe it was the back passenger side.

Q. Back passenger door?

A. Uh-huh.

Q. Did you get a look at anybody else who was in the car?

A. There were three other people in the car.

Q. Could you tell anything about what they looked like or how big they were?

A. It would be hard to tell just how big they were.

Q. What did you do at that point?

A. Well, I watched the car, and he came right back in front of the garage. There was one shot fired at that corner.

Q. At the corner of Morningside and Sheraton?

A. And Sheraton, yeah. So I got pretty worried then. So I kind of ran back towards the garage. And then the car came right back in front of me. And then it stopped again at the corner of Austin Highway and Sheraton. I heard another shot go off, and then I got concerned about maybe they were shooting back at me because I was hollering at the police officer. So I decided I better go on back inside. So I went on inside.

Q. Okay. And at some point did the police come and contact you?

A. Yeah. We called 911. And then about, oh, I would say within five minutes a police officer was there at or front door getting information from me as to what happened.

Q. Do you recall who that police officer was?

A. He was a Terrell Hills police officer. While he was standing there at the front door, he got a call saying he thought they had found, you know, they had found the people that had done the hold up.

Q. Can you tell us about the size and build

of the person that held you up?

A. Yeah. He was a little bit taller than I was, but thin.

Q. Thin?

A. Uh-huh.

Q. Could you tell anything about whether or not he was Hispanic or Anglo?

A. Well, just by his accent, I would say he was Hispanic.

MS. PARKER: Your Honor, could you again ask the Defendant to stand up and take off his coat so that Mr. Morehouse can get a look at him?

THE COURT: Yes.

Q. (By Ms. Parker) Mr. Morehouse, is this individual standing in front of you about the same size and build as the person who robbed you at gun point on October 20th, 1994?

A. I would say he's along the same. I would assume he's a few inches taller than I am and about the right build. But as to whether -- that's about all I could say.

Q. You don't know this individual, do you?

A. No. I do not.

Q. Do you know anybody named Bruce Fernandez?

A. No, I don't.

Q. What else happened when the police came to your house that night?

A. Well, after they -- after this officer left and took off down the street, or took off, we didn't know, so we closed -- locked back up so to speak. And a few minutes later, they came back and asked the --

Q. The police came back?

A. The police came back to the front door and asked if my wife and I would go down and see if we could identify the people at that car.

Q. Did you agree to do that?

A. Well, my wife didn't.

Q. But you did?

A. But I did. So I rode with the police officer back, and it was right in front of an apartment complex across from the Bun and Barrel on Austin Highway, kind of catty-cornered from the Bun and Barrel. There were a lot of police officers and cars and an ambulance, and the little blue car was there.

Q. Is that the blue car that I just showed you the photo of?

A. Right.

Q. Is that the same car that the Defendant jumped in when he left your house?

A. Right.

Q. What else did you do when you went out there to the scene of the car?

A. Well, the police officers kind of led me around. And there was -- the ambulance was there and they took me by the blue car, and it was pretty bloody. And there was -- my wife's purse was in the front part of the car sitting on the floor.

Q. So in that picture that I showed you where the purses are on the hood, someone moved them?

A. It wasn't on the hood; it was in the front seat, or on the floorboard of the front seat, on the passenger's side.

Q. Did they have you look at any of the suspects that they had there at the scene?

A. Yeah, they did. There were two suspects, one in one patrol car and one in other patrol car. And then there was a suspect that was in the ambulance.

Q. Did you go take a look at those three people?

A. Yeah. They asked me to go and look in the ambulance and look at the fellow to see if I could

identify him. He was a pretty heavy set young man. He was probably under 20 or so and he wasn't thin by any means.

Q. So he was not the same person that robbed you?

A. No, he wasn't.

Q. Okay. What about the other two suspects?

A. The other two suspects, I really, you know, like I told the police at that time, there wasn't any way that I could identify because the man had a mask on. But I told them that he was thin and a little bit taller than I was and was wearing black.

Q. So the two suspects that you saw in the two police cars, they could not have been that gunman because they were too big?

A. I wouldn't -- they weren't -- they were sitting in the car, so it would be hard for me to say.

Q. But you did not identify them as the gunman at that time?

A. No, I did not. I didn't identify any of these three as the gunman.

Q. And the guy in the ambulance you thought was too large of a person?

A. He was too large. He wasn't the right person.

Q. Did you help the police do anything else that night?

A. Yeah. Afterwards they didn't find the weapon, so I told the police officer that was there that they had shot again close to Austin Highway and Sheraton. So he and I, on the way back we thought maybe we'd look at -- there's a telephone pole right there at that corner.

Q. Was he taking you back to your house?

A. He was taking me back to my house. So we pulled up where the car had stopped the second time before it went off down Austin Highway, and we started looking around there and found the pistol.

Q. Is the pistol that you found there at the corner of Sheraton and Austin Highway similar to this gun that I showed you before, State's Exhibit number 4?

A. Yeah. It was an automatic. And the police officer picked it up and bagged it and whatever.

Q. Okay.

(Marked State's Exhibit Nos. 25, 26, 28 and 28 for identification.)

Q. (By Ms. Parker) Mr. Morehouse, I'm going

to show you some exhibits, State's Exhibit number 25, and ask you what that is a picture of.

A. That's Sheraton, heading north on Sheraton up to the Austin Highway. And the telephone pole is right in front. It looks like that's where we found the gun.

Q. Is that a view from near the side of your house where your garage would be?

A. It's on the same street where my garage is. My garage street is right here.

Q. Does that street, is it the same or similar to the way it was back on October 20th, 1994?

A. Right.

Q. Let me show you State's Exhibit number 26. Is that a closer view of the same photo?

A. Yes, it is.

Q. Is it the same as it was back on October 20th, 1994?

A. Yes, it is.

Q. Let me show you State's Exhibit number 27. Is this another photo of the pole that you're talking about?

A. Right. We found it right at the base of this telephone pole.

Q. Does it appear to be the same as it did on

October 20th, 1994?

A. Yes.

Q. And number 28?

A. It's the same pole.

Q. Is that pole the same as it was on October 20th, 1994?

A. Right.

MS. PARKER: Your Honor, at this time I'd offer exhibits 25, 26, 27, and 28 into evidence.

MS. KRAMER: No objection.

THE COURT: State's Exhibits 25, 26, 27, and 28 will be admitted into evidence; no objections.

Q. (By Ms. Parker) Mr. Morehouse, if I can ask you to step down here. I'm going to put a couple of photos on this imager so the jury can see what we're talking about.

A. Where do you want me to go? I can see it from here.

Q. You can? Okay. If you could explain to the jury what the view is in the left-hand photo and where you found that handgun when you were with the Terrell Hills police officer.

A. Okay.

THE COURT: What exhibit is that?

MS. PARKER: That's number, Exhibit 25 and 28.

THE WITNESS: My driveway is right here, so my garage goes up this way. And the car -- well, this is, back here is the post where we found the pistol. Same here on this post. It's right next to the post.

Q. (By Ms. Parker) Was it just thrown down on the ground?

A. It was on the ground.

Q. From where you remember hearing the second shot, is that about where you imagined it would happen?

A. Yeah. You can tell the car stopped here, and that's where I heard the second shot.

Q. How far down this intersection did the blue car stop, finally stop? Can you see it in this picture? When the blue car got back onto Austin Highway?

A. Where it stopped?

Q. Yeah.

A. It's only about three blocks down.

Q. On the left-hand side?

A. On the left-hand side.

Q. Okay. You can have a seat. Thank you. Did the person who took your money and your wife's purse on October 20th, 1994, did he have permission to take your things?

A. Oh, no. Huh-uh.

Q. At the time that he took them and held a gun on you, were you in fear that he might kill you or hurt you badly?

A. Yes.

Q. And what he stole from you was lawful currency of the United States?

A. Yes.

Q. Did you make a report to the police in connection with this robbery?

A. Yes, I did.

(Marked State's Exhibit No. 29 for identification.)

Q. (By Ms. Parker) Mr. Morehouse, I'm going to hand you what's been marked State's Exhibit number 29, and ask you if that is a copy of the statement that you gave to the police in connection with this robbery.

A. Yes, it is.

Q. Is that your signature at the bottom?

A. Yes, it is.

MS. PARKER: At this time I'll pass the witness and tender State's Exhibit 29 for defense counsel for cross-examination.

MS. KRAMER: One moment, please, Your Honor.

THE COURT: Yes.

THE WITNESS: It feels funny, Judge, being up on this side.

MS. KRAMER: I don't really have any questions of this witness, but I would like to ask the District Attorney's office if there are any other statements in their file given by Mr. Morehouse.

MS. PARKER: Your Honor, that is the only statement that we have by him.

THE COURT: Thank you, Jeff. Have a nice day.

THE WITNESS: Thank you, Judge.

MS. KRAMER: Your Honor, could we please have him on recall status? If they know how to get a hold of him if we need him.

THE COURT: Yes. They can get a hold of him any time you need him. Next witness?

MR. DIMALINE: The State calls Sergeant DeLeon.

THE COURT: Sergeant DeLeon. Please have a seat, Sergeant. After you have a seat, raise your right hand.

(Thereupon the witness was sworn by the Court.)

* * * * * *

ANDRES MILTON DELEON,

The witness, after having first been cautioned and duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

THE COURT: Your witness.

DIRECT EXAMINATION

BY MR. DIMALINE:

Q. Sir, can you please tell us your full name?

A. My name is Andres Milton DeLeon.

Q. Mr. DeLeon, what do you do for a living?

A. I'm a police officer for the City of Terrell Hills.

Q. How long have you been a police officer for the City of Terrell Hills?

A. Since November the 12th, 1986.

Q. What rank do you hold currently?

A. I'm the sergeant on dog watch.

Q. What exactly are your duties as a sergeant

on dog watch?

A. I'm the shift supervisor as well as a patrol officer on the street.

Q. So you're actually out on the street?

A. Yes, sir.

Q. Can you tell the jury a little bit about your law enforcement experience, please?

A. I've been a police officer since 1981, when I got out of active duty in the Army. I worked for four different departments. And I've got a degree, bachelor's degree in criminal justice. And I'm attending, currently attending the graduate management institute for the TCLOSE management school.

Q. Just so the jury will know, can you give the jurisdiction boundaries of your city, Terrell Hills?

A. The boundaries of our city would be, from the west would be North New Braunfels; the north would be Austin Highway, Rittiman; the east would be Harry Wurzbach; and the south would be Burr Road.

Q. Is that in Bexar County, Texas?

A. Yes, sir, it is.

Q. Sergeant, I want to take you to a specific date, that being October the 20th of last year, 1994, and ask you were you on duty in the evening, shortly

before midnight?

A. Yes, sir, I was.

Q. What shift were you working on that day?

A. I was working the ten to six shift.

Q. Ten p.m. to six a.m.?

A. Yes, sir.

Q. What were your duties at that time?

A. I was patrolling.

Q. Do you recall being parked stationary somewhere in the 800 block of Austin Highway shortly before midnight?

A. Yes, sir, I do.

Q. Where exactly were you parked?

A. I was sitting in the parking lot of the hair salon on the 800 block of Austin Highway.

MR. DIMALINE: May I approach the witness?

THE COURT: You may.

Q. (By Mr. Dimaline) Sergeant, we have a map that's been introduced into evidence as State's Exhibit number 5. Can you take a minute and familiarize yourself with it and see if you can find that location on that map? This is Broadway.

A. Approximately right here, sir.

Q. Can you place a red X on that area?

A. Yes, sir.

Q. For the jury's benefit, I'm going to point out where you were stationary at this location. And that location, Sergeant, is directly across from Sheraton Street; is that correct?

A. Just about directly across. Yes, sir.

Q. And at some point when you were sitting stationary, did something get your attention to draw your attention towards Austin Highway?

A. I was monitoring the north-bound traffic in the seven and eight hundred block of Austin Highway, and at approximately 11:40, I noticed two vehicles coming up the street.

Q. What direction were they headed?

A. They were headed north from North New Braunfels.

Q. Up Austin Highway?

A. Up Austin Highway. Right. One of them was a Cadillac, and it had its lights on. And the other one was directly behind it, maybe 10 to 15 feet at the most, with its lights out.

Q. And is that what drew your attention to it?

A. Yes, sir.

Q. The fact that the other car had its lights

off?

A. Yes, sir.

Q. Can you describe those vehicles for us?

A. Like I say, the one in front was a newer model Cadillac. I believe it was a two-door. And the one in the rear with its lights out was a Dodge, four-door Dodge, blue in color.

Q. What got your curiosity about the lights being off?

A. First of all, because they were driving up the street with their lights out, and secondly because they were following so close behind this Cadillac. As they approached Sheraton, the Cadillac turned right onto Sheraton and the Dodge made an immediate right, right behind it.

Q. How close in proximity were you to where those vehicles turned in front of you?

A. I was almost directly across the street from them as they made the turn.

Q. Okay. What did you think was going on at that point, Sergeant?

A. I didn't know what was going on at that point. I knew that something didn't look like right, so I immediately crossed the street and went after the car.

Q. Do you know the Morehouses that live there on 201 Morningside?

A. I know them now.

Q. You didn't know them before then?

A. No, sir?

Q. So you didn't recognize their Cadillac as being their vehicle?

A. No, sir.

Q. So what happened after you saw the cars turning there on Sheraton?

A. I saw them turn, and like I say, something looked unusual about it because they had the lights out and were following so close. So I crossed the median and went directly across into Sheraton. And I saw the blue vehicle, which was the Dodge, stop almost at Sheraton and Morningside. As I approached the vehicle, it fled. It fled south on Sheraton and then east on Morningside. As I approached Mr. Morehouse's driveway, a young man came running out of the driveway and headed south on Sheraton and up Morningside.

MR. DIMALINE: May I approach the witness?

THE COURT: You may.

Q. (By Mr. Dimaline) I'm going to show you what's been admitted as State's Exhibit number 6. Can

you take a minute and familiarize yourself with that? Does that look familiar to you?

A. Yes, sir.

Q. Those streets?

A. Yes.

Q. Those are streets in Terrell Hills?

A. Yes, sir.

Q. Is this, the path that we're seeing on State's Exhibit number 6, does that indicate the path that that blue car took?

A. Yes, sir. It came up Austin Highway, made the right-hand turn, went in back of the Cadillac. It stopped approximately right here.

Q. Let me do this. Let me put it on this machine real quick.

MR. FAHLE: May I, Your Honor?

Q. (By Mr. Dimaline) Sergeant, with the permission of the Court, if you could step down here with this pointer.

A. Okay.

Q. Maybe showing us on State's Exhibit number 6, where exactly were you located at that hair salon?

A. I was approximately right here.

Q. Okay. And again, show us the path or what exactly transpired that you observed.

A. Okay. I observed the Cadillac coming up Austin Highway right here. Directly behind it was the blue vehicle with its lights out. The Cadillac made a right-hand turn; the blue vehicle made a turn directly behind it. When I crossed from where I was approximately right here straight across to Sheraton, the blue car was stopped approximately right here in the drive -- right in front of the driveway. As I approached the vehicle, it fled, made a left-hand turn and went up Morningside. As I got to the driveway, a young man or male exited the driveway running, ran south on Sheraton and then cut across the yards on Morningside and headed east.

Q. Can you describe the man that you're talking about that you saw fleeing that location?

A. All I saw was the back of his body. I think he was maybe five eight, five seven.

Q. Okay.

A. Slim build, dark-haired, or dark something. I couldn't tell if it was his hair or what.

Q. Can you recall what he was wearing, what his clothing description was?

A. A red something. The back of the shirt or jacket or whatever, it was red with some kind of

inscription on it.

Q. Okay. Where exactly was that person going?

A. Like I say, he fled out of the driveway onto Sheraton; south on Sheraton; east on Morningside, and then he cut across these lawns right here and that's where I lost him.

Q. Okay. What did you do at that point?

A. I came to the rear of 206 Morningside and began looking for him. At that point, a gentleman from 200 Morningside came out and said he heard noises in the backyard. So I went around the house to Sheraton and came back to the driveway on his residence looking for him, at which point I received a call on the radio from the Morehouses saying that they had just been robbed, on the radio. The dispatcher called me by radio.

Q. What did you do when you received that information?

A. Well, at the time when I received the radio dispatch, I was still in the rear of 200. As I went back out to Sheraton, here came the blue car again coming westbound on Morningside. It made a right-hand turn onto Sheraton and Austin Highway. At that point, I went over and talked to the Morehouses.

Q. Did you attempt to chase that blue car?

A. Not at that point. No, sir.

Q. So your attention was focused on responding to the Morehouses?

A. Right. At that point, because they had made me aware that they had just been robbed.

Q. Did you make contact with somebody at that house?

A. Yes, I did. I made contact with Mr. and Mrs. Morehouse.

Q. What was their emotional state?

A. They were pretty shook up.

Q. And when you say pretty shook up, what do you mean?

A. Mrs. Morehouse was visibly upset. Mr. Morehouse was, he wasn't as upset as she was, but you could tell he was.

Q. Based on your investigation, what did you determine to happen?

A. Well, I didn't get to complete my investigation because as I was speaking to them in the front door of their residence, I received another radio dispatch telling me that the vehicle that I had seen or that I had described as turning down Sheraton and fleeing from me had been -- they had a vehicle

stop fitting that description on Austin Highway further down the street in the 1100 block.

Q. Okay. And what did you decide to do?

A. At that point I informed Mr. and Mrs. Morehouse that I would return to them to get the rest of the information; because I was going to go see what they had over there, to see if it was the same people.

Q. Did you see what direction that blue car left up Sheraton?

A. Yes, sir. They came -- As I say, I was exiting the back of 200 from the driveway. They made a right-hand turn onto Sheraton, came up to Austin Highway and made a right-hand turn, which would be going north on Austin Highway.

Q. At the time that you received the call from -- Was it the San Antonio Police Department that made the call?

A. Yes. San Antonio dispatched it as an on-site -- they had run into this vehicle that had an injured person in it.

Q. Okay. The time from that dispatch from S.A.P.D., that you received it on the radio, was that time consistent with the distance that that car could have traveled from this area down to where it ended up?

A. It was just a matter of minutes.

Q. Okay.

A. It could very well have gotten there after a period of time.

Q. Thank you, Sergeant. You may have a seat. This person that you saw fleeing from the Morehouses' residence, did you see him carrying anything in his hand?

A. He was carrying something black in his hand. It may have been a bag. I don't know. It was something black that he was holding by the hand?

Q. Did you ever see that particular person again?

A. No, sir.

Q. So what exactly transpired when you went down to the 1100 block of Austin Highway?

A. Well, when I drove up to the scene, I immediately noticed the car as being the same one that I had seen turn off of Austin Highway. There were no occupants in it. San Antonio Police Department had already taken the occupants out of the vehicle. I spoke with the San Antonio officers who had made the initial stop, and they informed me that they had received a story from the people in the car that they had been high jacked.

Q. Okay. Let me stop you there. This vehicle that was at the scene from the 1100 block of Broadway -- Austin Highway. I'm sorry. Let me hand you what have been admitted as State's Exhibits 12 and 13. Is that the same vehicle that we are talking about?

A. Yes, sir. It is.

Q. Is that the same vehicle that you saw driving with the lights out behind the Cadillac when you were sitting across the street?

A. Yes, sir. It is.

Q. Did you actually make contact with anybody that were passengers in this car?

A. I spoke to the two surviving passengers. Yes, sir.

Q. You say surviving passengers. Somebody --

A. The driver was deceased at the scene. Yes, sir.

Q. Where was he exactly when you drove up?

A. He was approximately 50 feet in front of the vehicle laying on the ground.

Q. And did you investigate as to what type of injury he had?

A. Yes, sir.

Q. And what type of injury was that?

A. He had received a bullet wound to the right jaw.

Q. And he was being treated there at the scene when you arrived?

A. I don't believe EMS had arrived yet at that point when I got there.

Q. And what did you do when you reached that scene in the 1100 block of Austin Highway?

A. I spoke with the San Antonio officers that were there first. Then I started to interview the occupants of the vehicle. I tried to speak to the deceased, but he wasn't able to speak at all.

Q. Okay. Was that due to the injury that he had sustained?

A. Yes, sir.

Q. At some point did one of the witnesses return to the 1100 block of Austin Highway?

A. Yes, sir. I requested that Mr. Morehouse return to the scene.

Q. What was the purpose of that?

A. To see if he could identify any of the occupants of the vehicle or the property that I had found in the vehicle.

Q. Did Mr. Morehouse come back to that scene?

A. Yes, sir. He did.

Q. This scene we're talking about, is that across from Bun and Barrel on Austin Highway?

A. No, sir. It's a little bit south of that. Approximately directly in front of a storage unit that's there.

Q. Okay. What happened when Mr. Morehouse came down to that area?

A. Well, initially when he arrived, I asked him if any of the property that I had found in the front passenger side of the vehicle belonged to him or his wife. He identified the black purse as being his wife's. At that point, EMS had already picked up the deceased, Lopez I believe was his name, and put him in the EMS module. We walked over to the EMS module and he took a look at him but he could not identify him for sure.

Q. Did Mr. Morehouse attempt to identify the other suspects that were passengers in the vehicle?

A. Not at that time, sir.

Q. What did you do at that point?

A. At that point, I took custody of the two passengers of the vehicle and transported them back to the Terrell Hills Police Department for questioning and processing.

Q. Do you recall what those individuals'

names were?

A. One of them was Carlos Garibay, who was the front passenger side passenger in the vehicle, and the other one went by the name of Fat Tony.

Q. I'm sorry?

A. Fat Tony.

Q. Fat Tony?

A. Yes, sir. I believe his name is Anthony Ybarra.

Q. Rudolfo Ybarra?

A. Rudolfo Anthony Ybarra. Yes.

Q. Do you recall the physical description of Carlos Garibay?

A. Approximately five-10, five-11; not fat, but stout. He's stout built; black hair about collar length at that time.

Q. Okay. What would your estimate be on his weight at that time?

A. He probably weighed about 200, 220.

Q. Okay. So a pretty big guy?

A. Yes, sir.

Q. What about Rudolfo Ybarra?

A. Pretty good size young man. He's probably, back then he probably weighed 280 at least, 300 pounds.

Q. And Jerry Lopez, the person that was shot, was he a large person as well?

A. I would say he was probably about my size, five-10, five-11, 180 to 190 pounds.

Q. Did you determine through your investigation if any property was taken from the Morehouses?

A. Yes, sir.

Q. What was that?

A. When I went back to finish my interview with the Morehouses, I was informed that Mr. Morehouse had lost a money clip with approximately $350.00 in it. Mrs. Morehouse had lost her purse, which was the one that Mr. Morehouse had identified as being the one in the vehicle.

Q. When the initial call went out from the dispatcher with the description of the suspect that Mr. Morehouse gave, do you recall what that description was?

A. I'm not sure if I heard it, because I was the officer on the scene.

MS. KRAMER: Your Honor, I'm going to object right now that that is hearsay.

THE COURT: Overruled.

THE WITNESS: I was the officer that

witnessed it and I believe I'm the one that put out the description of the person I chased.

Q. (By Mr. Dimaline) Okay. Do you have any knowledge if any weapon was recovered in your investigation?

A. Yes, sir. My partner, who was working with me that night, Officer Jim Bennett, recovered a weapon at the corner of Sheraton and Austin Highway, one being a nine millimeter high point.

Q. What did you do with Ybarra and Garibay when you transported them back to Terrell Hills?

A. Separated them. I waited for Detective Davis and Lieutenant Chavez to arrive and start doing their interviews.

Q. So Detective Davis and Chavez would have been in charge of taking statements from these suspects?

A. Yes, sir.

Q. You didn't have any involvement with that?

A. No, sir. After the initial interview at the scene where San Antonio had stopped them, that was the end of my conversation with them.

Q. Did you receive information as to the condition of Jerry Lopez?

A. Yes, sir. Approximately 15 or 20 minutes

after we arrived at the police department, I received a call saying that he had passed during the transport to the hospital.

Q. To BAMC?

A. Right, sir.

MR. DIMALINE: May I approach the witness?

THE COURT: You may.

(Marked State's Exhibits 30 and 31 for identification.)

Q. (By Mr. Dimaline) Sergeant, let me hand you what's been marked for identification purposes only as State's Exhibit number 30. It's a two-page document. Can you identify that?

A. I would say this would be my partner's report or my supplement report and the cover sheet.

Q. That's not your report?

A. I stand corrected. This is my report.

Q. Okay. Let me hand you what's been marked for identification purposes as State's Exhibit number 31, which is a five-page document. Can you identify that?

A. This is my offense report, sir.

Q. Based on your investigation of this case?

A. Right. The initial investigation.

Q. Did you make any other reports in connection with your investigation of this case?

A. No, sir.

Q. Okay.

MR. DIMALINE: Your Honor, at this time I'll tender State's Exhibit number 30 and 31 to defense counsel for the purposes of cross-examination, and pass the witness.

MS. KRAMER: May we have a moment, Your Honor?

THE COURT: You may.

CROSS EXAMINATION

BY MS. KRAMER:

Q. Officer DeLeon?

A. Yes, ma'am.

Q. My name is Suzanne Kramer, and along with John Fahle, we represent Bruce Fernandez. I just have two or three questions for you.

A. All right, ma'am.

Q. Initially, when you were sitting there at Creative Hair on Austin Highway and you saw the car following closely behind the Cadillac with its lights off.

A. Yes, ma'am.

Q. At any point in time did you see anyone

get out of that car?

A. No, ma'am.

Q. Did you ever see anybody get in or out, like in the car, out of the car? You just testified you saw no one get out of the car. Did you see anyone get in the car?

A. No, ma'am.

Q. In your police report, you say that you took Mr. Morehouse over to the scene to see if he could identify Jerry Lopez.

A. That's incorrect, ma'am. I did not transport Mr. Morehouse.

Q. Who did transport Mr. Morehouse?

A. My partner, Jim Bennett. I requested that he be transported, but I did not transport him myself.

Q. Earlier, Officer DeLeon, you did state when Mr. Dimaline was asking you questions that this was your report, and in this report you state that Officer Bennett, upon your request, picked up Mr. Morehouse and took him over to the scene.

A. Correct.

Q. Since you have stated that this is your report, in here it does state that Mr. Morehouse was requested to look at Mr. Lopez, and he could not identify him positively as the man who had robbed him

or not robbed him. He could not identify him one way or the other?

A. That's correct, ma'am.

MS. KRAMER: Pass the witness.

MR. DIMALINE: Just a couple more questions.

REDIRECT EXAMINATION

BY MR. DIMALINE:

Q. Sergeant, do you remember recovering a bandanna from that blue vehicle? Were you involved in that or not?

A. The ID cards, wallets and the bandanna had already been taken off the suspects by the San Antonio Police Department when I arrived.

Q. So you were not involved with the recovery of that particular piece of evidence?

A. I took custody of it afterwards. I was informed that the blue bandanna was taken out of the rear pocket of Mr. Garibay.

MR. DIMALINE: May I approach the witness?

THE COURT: You may.

Q. (By Mr. Dimaline) I hand you what's been marked for identification purposes as State's Exhibit number 15, which came with some other articles out of

this bag.

A. Yes, sir.

Q. Can you identify this, State's Exhibit number 15?

A. It appears to be the same bandanna that was recovered at the scene by the San Antonio Police Department.

MR. DIMALINE: Okay. Your Honor, at this time I'd like to offer State's Exhibit number 15.

MS. KRAMER: I'm sorry. Are you just waiting for an objection on this?

MR. DIMALINE: Yes.

MS. KRAMER: No objection.

THE COURT: State's Exhibit number 15 will be admitted into evidence; no objections.

MR. DIMALINE: I have no further questions.

MS. KRAMER: Your Honor, I just have a few more.

RECROSS EXAMINATION

BY MS. KRAMER:

Q. You just testified, Officer DeLeon, that you recovered at the scene this black bandanna. When you say the scene, you mean the car where Jerry Lopez

IN THE

DISTRICT COURT OF BEXAR COUNTY, TEXAS

227TH JUDICIAL DISTRICT

THE STATE OF TEXAS,		
Plaintiff		
VS.		NO. 95-CR-0391
BRUCE FERNANDEZ,		
Defendant		

STATEMENT OF FACTS

VOLUME IV OF VOLUMES

APPEARANCES:

FOR THE STATE:	MR. A.J. DIMALINE and MS. LAURA PARKER Assistant District Attorneys Bexar County Justice Center San Antonio, Texas 78205
FOR THE DEFENDANT:	MS. SUZANNE KRAMER and MR. JOHN FAHLE Attorneys at law 127 Lewis St. San Antonio, Texas 78212-5818

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BE IT REMEMBERED that the above-styled and numbered cause came on to be heard beginning on the 30th day of November, 1995, before the HON. MIKE M. MACHADO, Judge of the 227th Judicial District of Texas, at San Antonio, Texas.

COPY

PROCEEDINGS

THE COURT: Okay this is a hearing on a Jackson/Denno motion. The State's ready?

MS. PARKER: State's ready.

THE COURT: Defendant ready?

MR. FAHLE: We're ready, Your Honor.

THE COURT: Okay. Who's the first witness?

MR. DIMALINE: Detective Davis.

THE COURT: Sergeant Davis is still under oath. Okay. Your witness.

(Thereupon, DONALD F. DAVIS, the witness, having been previously sworn, continued his testimony as follows:)

VOIR DIRE EXAMINATION

BY MS. PARKER:

Q. Detective Davis, could you please state your name again for the record?

A. Donald F. Davis.

Q. You are the same police officer that was here testifying yesterday in the case against Bruce Fernandez?

A. One of them. Yes, ma'am.

Q. Okay. Can you tell us a little bit about

what your current duties are?

A. Detective investigator assigned to the criminal intelligence -- or investigation division of the Terrell Hills Police Department.

Q. Are you a certified peace officer?

A. Yes, ma'am, I am.

Q. How long have you been certified?

A. Twenty-three years. Carry a master's certification.

Q. What kind of training and experience do you have?

A. Thousands of hours of training.

Q. Did you go to any special schools or any sort of police academies when you were beginning?

A. Yes, ma'am. Started the basic academy. We do 20 to 40 hours a year of in-service training. Plus there's several specialty schools that we attend.

Q. In connection with your investigation of this case, the State of Texas versus Bruce Fernandez, did you have an opportunity to meet with the Defendant, Bruce Fernandez?

A. Yes, ma'am, I did.

Q. Do you see Bruce Fernandez here in the courtroom?

A. Yes, ma'am, I do.

Q. Can you point him out and tell us what he's wearing?

A. He's the gentleman on the immediate left of that table. He's wearing a gray jacket, shirt, tie. Short hair.

MS. PARKER: Your Honor, let the record reflect that he's identified the Defendant.

THE COURT: Let the record so reflect.

Q. (By Ms. Parker) At the time you were investigating this case, when did you see the Defendant?

A. His mother brought him in the day after.

Q. The day after the aggravated robbery?

A. The day after the robbery. Yes, ma'am.

Q. What date was that?

A. October 21st, I believe.

Q. Of 1994?

A. Of 1994.

Q. Okay. Did you meet with the Defendant at your police station?

A. Yes, ma'am, we did.

Q. Do you have a special room for talking with defendants?

A. We take them upstairs into the offices of

the investigations offices.

Q. Is there a private room where you meet?

A. That's basically private. No one has access to that.

Q. Can you describe to us the setting of the room?

A. It's a rather large room, approximately 20 by 20, 25. It has two desks in it, several cabinets, file cabinets, computer. Just a basic office.

Q. On the day when you met with the Defendant at your police station, were there any other witnesses present?

A. Originally his mother brought him in. She was up in the office, as was Lieutenant Robert Chavez, formerly with the Terrell Hills Police Department.

Q. When you met with the Defendant, actually to take a statement, was his mother in the room?

A. No, ma'am. She was not.

Q. Prior to taking the Defendant's statement, did you advise him of his constitutional rights?

A. Yes, ma'am. We did.

Q. Specifically did you advise him of his right to have an attorney?

A. Yes, ma'am.

Q. Of his right to remain silent?

A. Yes, ma'am.

Q. That anything he said could be used against him?

A. Yes, ma'am.

Q. That he had a right to have an attorney present prior to and during any questioning?

A. Yes, ma'am.

Q. And that he had a right to an appointed attorney to advise him prior to any questioning?

A. Yes, ma'am.

Q. And that he had the right to terminate the interview at any time?

A. Yes, ma'am.

Q. Did he indicate that he understood each of these rights?

A. Yes, ma'am, he did.

Q. How did he make it known to you that he understood his rights?

A. Both verbally, and on the initial statement we took by initialing next to each individual statement indicating that he understood them as they were read and explained to him.

Q. After you advised the Defendant of his constitutional rights, did he indicate that he would waive those rights and speak with you?

A. Yes, ma'am.

Q. Did you ask him if he would agree to give a statement?

A. Yes, ma'am, we did.

Q. Did he give you such a statement?

A. Yes, ma'am, he did.

Q. At any time during the taking of that statement did he request to have an attorney present?

A. No, ma'am.

Q. At any time did he ask that the interview stop?

A. No, ma'am.

Q. At any time did you coerce or threaten him into giving you the statement?

A. No, ma'am, we did not.

Q. Did you promise him anything, either directly or indirectly, that you would do for him in exchange for his statement?

A. No, ma'am. Absolutely not.

Q. Did you deny him any basic necessities, such as using the restroom or getting a drink of water or eating something if he was hungry?

A. No, ma'am. They were available.

Q. What time of day did you take this statement?

A. Exact time, I can't answer. It was in the evening hours.

Q. Okay. On the 21st of October of 1994?

A. Yes, ma'am.

Q. Did it appear to you that the Defendant was under the influence of any drugs or alcohol?

A. No, ma'am.

Q. He seemed coherent to you?

A. Oh, yes, ma'am.

Q. Can you tell us how you got in touch with the Defendant? How he came to be at your police station on the 21st of October, 1994?

A. Apparently Lieutenant Chavez had talked to his mother. She called the office asking if we were looking for him, and he had told her yeah. She then brought him to the office.

Q. So his mother actually set up the appointment?

A. Well, basically. Yes, ma'am.

Q. So he came in freely and voluntarily?

A. Yes, ma'am. With his mother.

Q. Was he under arrest at that time?

A. No, ma'am.

Q. Can you explain to us the procedure that you followed in taking his statement?

A. Initially interviewed him, talked to him, asked him to tell us the story. He told us the story. We converted it into writing, then gave him the statement, asked him to read it; if there were any corrections that he felt needed to be made, any changes that he wanted. Once he was satisfied with it, he initialed it and signed it.

MS. PARKER: Your Honor, may I approach the witness?

THE COURT: You may.

(Marked State's Exhibit No. 47 for identification.)

Q. (By Ms. Parker) Detective, I'm going to hand you what's been marked State's Exhibit 47 for identification purposes, and can you tell us what that is?

A. This is the initial statement given to us by Bruce Fernandez, taken by myself.

Q. What day was it taken on?

A. October 21st, 1994.

Q. At what time?

A. 1943 hours, which is 7:43 p.m.

Q. Does State's Exhibit number 47, does it contain the constitutional rights that you explained to the Defendant?

A. Yes, ma'am, it does.

Q. Can you read us what those rights are?

A. This is me reading them to him, saying that: I have the right to remain silent and not make any statement at all, and that any statement you make may be used against you at your trial. Any oral or written statement that you make may be used in evidence against you in Court. You have the right to have your lawyer present to advise you before and during any questioning by peace officers or attorneys representing the State. If you are too poor to hire a lawyer, then the Court will appoint a lawyer for you free of charge, and he can advise you before and during any questioning. You can decide to talk with anyone and you can stop talking with them at any time you want. The above rights are continuing rights which can be urged by you at any stage of the proceedings.

Q. And did the Defendant place his initials by each and every one of these rights that you read to him?

A. Yes, ma'am, he did.

Q. And did he appear to understand what he was doing?

A. Yes, ma'am, he did.

Q. Did he indicate to you that he understood his rights?

A. Yes, ma'am, he did.

Q. Did he appear intoxicated or anything at that time?

A. No, ma'am.

Q. Was he responding in an appropriate manner to you?

A. Yes, ma'am.

Q. Can you read the next paragraph of the statement?

A. Immediately under the rights?

Q. Yes.

A. It says: Prior to and during the making of the statement, I have and do hereby knowingly, intelligently and voluntarily waive the above explained rights, and I do make the following voluntary statement of the aforementioned person of my own free will and without any promises or offers of leniency or favors and without compulsion or persuasion by any person or persons whomsoever.

Q. And that is contained in the statement that you took from Bruce Fernandez?

A. Yes, ma'am.

Q. Did you read that part to him?

A. No, ma'am. He read that himself.

Q. When did he do that?

A. Immediately after giving the statement.

Q. So at the time you took the statement, did he freely and voluntarily waive his right to remain silent?

A. He did that before we took the statement. Yes, ma'am.

Q. Did he waive his right to have an attorney present prior to and during any questioning?

A. Yes, ma'am.

Q. Did he indicate that he understood that the statement he was making could be used against him as evidence in court?

A. Yes, ma'am. He was told that and indicated he understood that.

Q. Did he indicate that understood that if he was unable to employ an attorney one would be appointed to advise him prior to and during any questioning?

A. Yes, ma'am.

Q. Did he indicate that he understood that he had the right to terminate the interview at any time?

A. Yes, ma'am.

Q. After the statement was prepared, did you

give him an opportunity to review it?

A. Yes, ma'am. He was given a copy of it to read, and he was given the opportunity to make any changes that he wanted.

Q. Okay. Do you know whether or not -- did he make any changes or additions?

A. I don't believe so. No, ma'am. It appears to be as taken.

Q. Did you have him initial at the top and bottom of each paragraph to indicate that those were the statements that he wanted to make?

A. Yes, ma'am. The initials in the body of the statement indicate the starting points and ending points, that nothing was added or deleted from this statement.

Q. After the statement was completed, did Bruce Fernandez sign the statement?

A. Yes, ma'am, he did.

Q. And he signed it in your presence?

A. Yes, ma'am.

Q. Did he sign each page of the statement?

A. Yes, ma'am, he did.

Q. Okay. And can you read what the last paragraph of the statement says?

A. Last paragraph says: I have read this

statement consisting of two pages, each page of which bears my signature, and I do affirm that all facts and statements contained herein are true and correct. And then there's a signature line underneath it.

Q. Did you read this statement aloud to him when it was done, or did you let him read it to himself?

A. I let him read it to himself. He was dictating it to me as I was typing it, basically.

Q. Okay. Do you know how old Bruce Fernandez was at that time?

A. I believe he was 18.

Q. He didn't indicate to you that he wasn't able to read?

A. Oh, no, ma'am. In fact, he was asked if he could.

Q. Detective Davis, this State's Exhibit number 47, is that a copy of the statement that Bruce Fernandez gave you?

A. Yes, ma'am.

MS. PARKER: Your Honor, at this time for the purposes of this hearing, I would offer State's Exhibit number 47. I believe defense counsel has a copy of it.

MS. KRAMER: Yes, we do. The first

one? The one you've got in your hand?

MR. FAHLE: I'm sorry. Are you moving to introduce that for purposes of this hearing? Judge, I mean, it's a hearing to decide the admissibility of this statement. I don't see any need for it to actually come into evidence even at this hearing, for the limited purpose. The problem being if it doesn't later come in, as the Court has not decided yet, if it doesn't later come in, that's just that much more we have to sort through.

THE COURT: You filed a motion for a Jackson-Denno hearing. That's what this is all about.

MR. FAHLE: Yes, Your Honor. I just don't know that the confession itself has to come in. The issue is whether -- you know, he's already read the pertinent parts about the waivers.

THE COURT: Do you wish to cross examine the witness?

MR. FAHLE: I'm sorry?

THE COURT: Do you wish to cross-examine the witness?

MS. PARKER: Your Honor, I haven't

passed him yet.

THE COURT: Huh?

MS. PARKER: I haven't passed him yet.

THE COURT: You haven't passed him yet.

MR. DIMALINE: We just feel like it needs to be part of the record at this time, Judge. That's the purpose of offering it at this time, for the purpose of the hearing.

THE COURT: What says the defense?

MR. FAHLE: Your Honor, the pertinent parts of this statement are, you know -- if nothing else, it's cumulative. The pertinent parts are the parts that he just read into the record; that is, that the Defendant, you know, I have the right to remain silent and not make any statement at all, any statement -- goes through his Miranda rights and the waiver of those rights. I don't know that it's necessary to have the actual statement itself in evidence.

THE COURT: The State is offering this exhibit 47 in evidence. Do you have any objections?

MR. FAHLE: Just that it's cumulative, Your Honor.

THE COURT: It's what?

MR. FAHLE: Cumulative.

THE COURT: State's Exhibit number 47 will be admitted into evidence.

MR. FAHLE: Is that, I take it, only for the purposes of this hearing; is that correct, Your Honor?

THE COURT: So far, yeah. I'll make a general ruling on it.

Q. (By Ms. Parker) Detective Davis, subsequent to this first statement, did you take another statement from the Defendant, Bruce Fernandez?

A. Yes, ma'am, I did.

Q. Is that the same Bruce Fernandez that you identified earlier?

A. Yes, ma'am.

Q. On what date did you take that statement?

A. I believe that one was done on November 1st.

Q. So that's about ten days after the first statement?

A. Yes, ma'am.

Q. Where did you take that statement?

A. In the investigative offices of the Bexar County Sheriff's Department.

Q. And at that time, did you again advise Bruce Fernandez of his right to have an attorney?

A. Yes, ma'am.

Q. And of his right to remain silent?

A. Yes, ma'am.

Q. Did you advise him that anything he said could be used against him?

A. Yes, ma'am.

Q. That he had the right to have an attorney present prior to and during any questioning?

A. Yes, ma'am.

Q. That he had the right to have an appointed attorney?

MR. FAHLE: I'm sorry. This is as to the first?

MS. PARKER: Second statement.

MR. FAHLE: I'm sorry. I apologize.

MS. PARKER: May I proceed?

Q. (By Ms. Parker) Right to have an attorney appointed to advise him prior to and during any questioning?

A. Yes, ma'am.

Q. And that he had the right to terminate the interview at any time?

A. Yes, ma'am.

Q. On November 1st, 1994, did Mr. Fernandez indicate that he understood each of these rights that you had advised him of?

A. Yes, ma'am, he did.

Q. How did he indicate this to you?

A. Both verbally, and he also initialed them.

Q. At this time did he indicate to you that he would agree to waive his rights and speak to you?

A. Yes, ma'am.

Q. And did you speak to the Defendant on that day?

A. Yes, ma'am, I did.

Q. And then did you take another statement from him?

A. Yes, ma'am, I did.

Q. Did he agree to give you such a statement?

A. Yes, ma'am, he did.

Q. At any time during the taking of this statement on November 1st of 1994, did Bruce Fernandez request an attorney?

A. No, ma'am. He did not.

Q. At any time did he request that the interview cease?

A. No, ma'am. He did not.

Q. Did you threaten him or coerce him into

giving this statement?

A. Absolutely not.

Q. At any time did you directly or indirectly promise him anything in exchange for his statement?

A. No, ma'am. I did not.

Q. Did you deny him any basic necessities, such as using the restroom, food or drink?

A. None were asked for. No, ma'am.

Q. Did it appear to you that he was under the influence of any drug or alcohol at that time?

A. No, ma'am.

MS. PARKER: May I approach the witness?

THE COURT: You may.

(Marked State's Exhibit No. 48 for identification.)

Q. (By Ms. Parker) Detective Davis, I'm going to hand you what's been marked State's Exhibit 48 for identification purposes. Can you tell me what that is?

A. It's a copy of the second statement I took from Bruce Fernandez.

Q. On what date did you take it?

A. November 1st, 1994.

Q. At what time?

A. 1345 hours, which is 1:45 p.m.

Q. What was the location where you took the statement?

A. Bexar County Sheriff's Office, CID offices.

Q. Do they have a special room there for you to talk to defendants?

A. There's a series of rooms in there that are used for interviews and polygraph purposes. Yes, ma'am.

Q. What was in the room where you took his statement?

A. Just a bare table, some chairs.

Q. Did it have a typewriter or anything for you to take the statement down?

A. I had to take the typewriter in there to do it.

Q. So you brought a typewriter from your office?

A. Yeah.

Q. Can you read into the record the first paragraph of this statement, starting with "I am giving this statement"?

A. It says: I am giving this statement to Detective Sergeant Donald F. Davis, ID number 221, who

has identified himself as a police sergeant assigned to the Criminal Investigations, Terrell Hills Police Department. And he has duly warned me that I have the following rights: That I have the right to remain silent and not make any statement at all; and that any statement I make may be used against me at my trial; that any statement I make may be used as evidence against me in court; that I have the right to have a lawyer present to advise me prior to and during any questioning; that if I am unable to employ a lawyer, I have the right to have a lawyer appointed to advise me prior to and during any questioning; and that I have the right to terminate the interview at any time.

Q. Are these the rights that you advised the Defendant, Bruce Fernandez, of on November 1st?

A. Yes.

Q. Did you actually read this paragraph to him?

A. It was read to him.

Q. Can you read the next paragraph?

A. Prior to and during the making of the statement, I have and do hereby knowingly, intelligently and voluntarily waive the above explained rights and I do make the following voluntary statement to the aforementioned person of my own free

will and without any promises or offers of leniency or favors and without compulsion or persuasion by any person or persons whomsoever.

Q. Did he indicate that he understood that paragraph?

A. He read that paragraph.

Q. Did he place his initials after that paragraph?

A. Yes, ma'am. He did.

Q. And then did he give you the statement?

A. Yes, ma'am. He did.

Q. Like the first statement, did you type it as he was telling it to you?

A. Yes, ma'am. I did.

Q. After you were done typing it, did you give him a copy?

A. I let him see the original.

Q. Okay. And did you let him read it to himself?

A. Yes, ma'am. He read it.

Q. And did you tell him that he could make any changes or deletions if he wanted to?

A. Yes, ma'am. I did.

Q. Did he make any?

A. He made some corrections. This one was

done on a typewriter instead of a word processor and the spell check was not there, so he did make some corrections on it. Yes, ma'am.

Q. But they are typo corrections?

A. Typos, basically. Yes, ma'am.

Q. For the record, can you identify the first correction that he made and tell us like what line and page it appears in?

A. Okay. It will be on the first page, the third line down, the last third of the sentence where it says: I fell asleep -- and I don't know what was there -- in the car. Basically he changed the spelling on it and wrote, initialed it B.F. above the scratch-through.

Q. If I could direct your attention to the very top of the page where the heading is.

A. Uh-huh.

Q. Did he make any corrections or deletions at that point?

A. Yes, ma'am. On his name, it appears that I have Bruce Lee. I think I put Hernandez, it appears like, and it's Fernandez. And he changed it to an F and initialed that also.

Q. Are there any other corrections located on the first page?

A. None that I see. No, ma'am.

Q. Did he initial at the bottom of the paragraph for the first page?

A. Yes, ma'am. He did.

Q. Did that indicate that he felt it was accurate and that's what he wanted his statement to say?

A. Yes, ma'am.

Q. On the second page, did he make any additions or deletions?

A. Yes, ma'am. There's some -- no additions or deletions, just some changes in the typographical errors.

Q. Where do they appear?

A. In the bottom half of the statement.

Q. Can you tell us what they are?

A. There's a typo in a sentence that said: I crossed Austin Highway. It was supposed to say went to the bus stop, and the word went, I left the T off. He added that and initialed it. And the word stop, of bus stop, it looks like I put two P's in it. He scratched one P and initialed that also.

Q. Did he also initial at the end of the paragraph?

A. Yes, ma'am. Both at the beginning and the

end.

Q. So he was reading this carefully to catch those little typos?

A. Oh, yes, ma'am. He read it.

Q. Did he sign both pages of this statement?

A. Yes, ma'am. He did.

Q. Did you see him sign them?

A. Yes, ma'am. He signed them in front of me.

Q. Was there anybody else in the room with you when you took this statement?

A. At this time, no, ma'am.

Q. Okay. And the Defendant freely and voluntarily waived his right to remain silent?

A. Yes, ma'am. He did.

Q. He waived his right to have an attorney present prior to and during any questioning?

A. Yes, ma'am. He did.

Q. He knew that this statement could be used against him as evidence in court?

A. Yes, ma'am. He did.

Q. And he voluntarily waived the right to have a court appointed attorney prior to or during any questioning?

A. Yes, ma'am. He did.

Q. And he knew he had the right to terminate the interview at any time?

A. Yes, ma'am. He did.

Q. After the statement was prepared, you gave him a copy and let him review it?

A. I gave him the original and let him review it.

MS. PARKER: Your Honor, at this time I would offer State's Exhibit 48 into evidence. I believe the defense already has a copy of it.

MR. FAHLE: And that's 48?

MS. PARKER: Yes.

MR. FAHLE: Judge, for the limited purpose of this hearing, we have no objections.

THE COURT: State's Exhibit number 48 will be admitted into evidence.

MS. PARKER: At this time, I pass the witness.

MR. FAHLE: Could we have just a second, Your Honor? May I have just a moment, Your Honor, to examine the --

THE COURT: You may.

MS. PARKER: For the record, I've just given him a copy of Detective Davis' report regarding this incident.

MR. FAHLE: Sorry, Your Honor. Just one more second, if I may, please.

THE COURT: Yes.

VOIR DIRE EXAMINATION

BY MR. FAHLE:

Q. Sir, again my name is John Fahle. We had an opportunity to speak to each other yesterday; did we not?

A. Yes, sir. We did.

Q. From the stand, while you were on the stand.

A. Yes, sir.

Q. And I examined you about some other matters that you testified about in this same case?

A. Yes, sir.

Q. Sir, again, at this time I'm not going to have a whole lot of questions for you, but I do have a few. Tell me a little bit about this -- let's start with the second statement, November 21st of 1994 -- sorry. November 1st, I'm sorry, of 1994. I apologize.

Mr. Fernandez was in custody at that time; is that correct?

A. Yes, sir. He was.

Q. How long had he been in custody at that

time; do you remember?

A. From the day of the initial statement.

Q. So immediately after the October 21st, '94 statement you took, you took him into custody?

A. Yes, I did.

Q. And he remained until November 1st, which is, what, a couple of weeks later?

A. Yes, sir. Approximately ten days or so.

Q. I'm sorry?

A. Approximately ten days.

Q. Okay. Tell me what happened that morning between you and him -- or that afternoon, I guess? You said this happened, if I'm not mistaken, at 3:45 in the afternoon, this second statement? Let me just show this to you if you need to refresh your memory.

A. I think it's 1345.

Q. I'm sorry. 1345, so that would be what?

A. 1:45.

Q. 1:45 in the afternoon?

A. Yes, sir.

Q. On November 1st. Tell me a little bit about the events leading up to this second statement being given.

A. I made an appointment with CID officers to have Mr. Hernandez brought down -- or Fernandez, still

using an H -- to the CID offices for an interview, and I also made arrangements to have a polygraph examiner available. And he was offered an opportunity to take a polygraph, which he consented to.

Q. Okay. Now, why did you -- you say he was offered an opportunity. You offered him this opportunity?

A. Yes, sir.

Q. When you say offered an opportunity, tell me exactly what you said to him.

A. I told him that I was making a polygraph examination available to him; that he did not have to take it if he did not want to take it.

Q. Okay. And at that point -- and what time was that? You said you made an appointment.

A. I had called him and told him that I would like to be down there. I don't remember. It was, I think, 1:00 o'clock or so.

Q. When you say you called him, that's the polygrapher?

A. No. Actually I called the County. I had already called the polygrapher and he had given me a time that he would be available, approximately 1:00, 1:30.

Q. Okay.

A. Then I called the county and asked them if they had an office open at that time and to have him downstairs.

Q. Okay. Where is -- tell me where these offices are.

A. It's at the main jail.

Q. Okay.

A. On Comal Street.

Q. And so when you arrived, was this polygraph examination, was this in progress?

A. Oh, no. No. Huh-uh.

Q. That's right. First you went to see Bruce.

A. Yes, sir.

Q. And you said, I'm giving you the opportunity to take this polygraph examination.

A. Yes.

Q. Did you tell him why you were doing that?

A. To verify the truth of his statement.

Q. Okay. And that -- I mean, to verify the truth of his statement. But why was this an opportunity to him? Did you explain to him why it was an opportunity?

A. I told him when he took the first statement that I didn't believe it, but I would offer

him an opportunity to take a polygraph. He said he did nothing, not lied, had no problem, was more than willing to take it.

Q. That what?

A. He would be more than willing to take the test, polygraph test.

Q. Okay. What did you tell him would happen if he passed the polygraph test? What did you tell him would happen if he were to pass the polygraph test?

A. I told him that as far as I was concerned, the polygraph would either prove or disprove his statement.

Q. Okay. And he could -- but what would happen as a result of that?

A. I don't understand the question.

Q. Well, if it proved his statement, what is it that you told him would happen?

A. If it proved his statement?

Q. If it proved the truth of his statement.

A. That it would clear him.

Q. That it would clear him?

A. Yeah, basically.

Q. Okay. Did you remind him at this time -- remember this is at this time before you came in to

take the second statement, the first time you met him that day did you remind him of his right to remain silent, his Miranda rights to remain silent and not to incriminate himself?

A. On the date of the second statement?

Q. Yes.

A. Yes. He was told that his Miranda rights were in effect.

Q. Unquestionably, unquestionably, he apparently signed the waiver that's on the form, on you all's form for voluntary statement; right?

A. Right.

Q. You've already testified to that. But I guess what I was asking, before that time and before you came in to take the second statement, because you didn't come in and have him sign this thing before you all got started, right?

A. Oh, no. Absolutely not.

Q. Right. Now, before that time and before he took the polygraph, you said: Bruce, look, I'm going to give you a chance to take a polygraph to verify this. If it turns out your statement is true, that clears you. You said that. And if it doesn't, before we get started, I want you to sign this waiver form. You didn't do that?

A. No, I did not.

Q. Okay. He didn't sign any of this until 1345?

A. Exactly.

Q. Okay. Did you give him his Miranda warnings again that afternoon before he took the polygraph?

A. No, sir. I did not.

Q. Okay. And he did not affirmatively waive any of those Miranda rights that afternoon before he took the polygraph either, did he? When I say affirmatively waive, I mean it's one thing for him to just take the polygraph to acquiesce, but he didn't affirmatively waive his right to counsel the way he did here?

A. No. He did not.

Q. Okay. You just figured, well, he wants to do it. I've told him he doesn't have to if he wants to. That's okay.

A. Yes.

Q. Now, the same goes, I guess -- let's go back to the date of October 21st, the date of Mr. Fernandez's first statement.

A. Yes, sir.

Q. When he first came into the office --

well, let me just show you this. Is it up here?

MS. PARKER: The Judge has it.

THE COURT: Do you need the statements? You've got both of them.

Q. (By Mr. Fahle) When Mr. Fernandez first came into the office, showing you what's been marked as State's Exhibit 47 and entered into evidence for the limited purpose of this hearing as State's Exhibit 47, there are a bunch of written waivers up here at the top.

A. Yes, sir.

Q. Okay. And he's initialed each one of them and you told us that.

A. Yes, sir.

Q. Okay. And then every word he said after that, he immediately dictated?

A. No, sir. He was read the statements also off of a statement card, which is basically the same statements as that one is. And we talked from there.

Q. Okay.

A. Okay. These are used to reiterate their rights afterwards. But basically, I guess, he was read his rights twice.

Q. Do you have -- that's off of your form that you use, the police department, that's the

warning to arrestee or suspect; is that correct?

A. Exactly.

Q. Do you have a copy of that card on you, officer?

A. Yes, sir.

Q. May I see that, please? Now, this is a juvenile warning card. Oh, I'm sorry. On the back side we have the rights of arrestee or suspect.

A. Right.

Q. Sir, what I would like to do with your permission, and I know this is a laminated card. It's not just one of those cards that you carry around, but may I enter this into evidence for this hearing?

A. Yeah.

Q. Thank you.

MR. DIMALINE: Judge, I have a better suggestion. Why don't we just photocopy that so he can keep his original card.

MR. FAHLE: That will be fine with me, Judge. I have no objection.

THE COURT: Give it to Lillian.

THE CLERK: Right here, sir.

THE COURT: He wants to make a copy of this.

Q. (By Mr. Fahle) Officer, while they're

making those copies, let me just show you again State's Exhibit 47 and ask you, so that we're perfectly clear on this, Mr. Hernandez -- I'm sorry, Mr. Fernandez never saw -- the Defendant never saw this form until you all got ready to formally put the statement down in writing?

A. Yes, sir.

Q. I am correct in that statement?

A. Yes.

Q. Okay. And he did not sign any part of this form until after he had already given you his statement?

A. Yes, sir.

Q. Is that correct? Okay. You all talked for a while before you actually transcribed this statement; is that correct?

A. Yes, sir. Basically, he --

Q. In fact, what you did is you went through and he told you what he wanted to tell you and then you asked him questions about details that you wanted cleared up, correct?

A. Correct.

Q. And then you all kind of came to an agreement on how this thing was going to be -- because State's Exhibit 47 is not a direct transcription of

his words, is it?

A. It is as he was -- we asked him to re-dictate his statement to us.

Q. To re-dictate?

A. Yes, sir.

Q. Okay. At that time, let me ask you this: This top part of State's Exhibit 47 down to -- it goes down to paragraph six where it says, "You can decide stop talking," et cetera, then there's a paragraph after that, "prior to and during the making of this statement."

A. That is all included in it.

Q. When you say that's all included in it, is this a form?

A. Yes, sir.

Q. Okay. So this was already here at the top of the form?

A. Yes, sir.

Q. Everything down to "by any person or persons whomsoever"?

A. Exactly.

Q. From there you start typing in?

A. Yes, sir.

Q. Okay. Now, but again, he had not seen that form until you all -- until you had entirely

transcribed this?

A. Yes, sir.

Q. When you say yes, sir, I'm sorry, he had not?

A. He had not seen it until it was printed and given to him.

Q. Okay. By that time, he had already given you one oral statement; right? I mean, that is, his initial statement, and one -- and then re-dictated it as you say?

A. Exactly.

Q. Okay.

MS. KRAMER: Your Honor, just for a moment, may I confer just a moment?

THE COURT: I beg your pardon?

MS. KRAMER: May I confer with him for a minute?

THE COURT: Sure.

(Marked Defendant's Exhibit No. 4 for identification.)

THE COURT: Minute's up.

Q. (By Mr. Fahle) Officer, I'm handing you what's been marked Defendant's Exhibit 4, and I would ask you to look at that and tell us what it is, please.

A. It's a rights card that we use to read suspects their Miranda warnings.

Q. Okay. And that's the rights card that you carried in your wallet that I asked you for a minute ago?

A. Yes, sir.

Q. That is a copy of that that we made for purposes of this hearing?

A. That is a copy.

Q. Looking at the second page, that's the other side of that rights card, correct?

A. Yes, sir. The juvenile warnings.

Q. You don't read that to all the suspects?

A. No. It's just juveniles.

Q. You simply read depending -- I'm sorry.

A. One side is adult and one side is juvenile.

Q. Okay. Now, this card --

MR. DIMALINE: Judge, can I compare it to the original?

THE COURT: Sure.

MR. FAHLE: Your Honor, I offer Defendant's Exhibit 4 in evidence.

MR. DIMALINE: No objections for the purposes of this hearing.

THE COURT: Defendant's Exhibit number 4 will be admitted into evidence.

MR. FAHLE: Thank you, Your Honor.

Q. (By Mr. Fahle) Now, I'm going to ask you to look at Defendant's Exhibit 4 and just tell me, and I'm sure you've seen this many times before, but it tells us your basic Miranda rights?

A. Yes, sir.

Q. Okay. It starts with: You have the right to remain silent.

A. Yes, sir.

Q. Well, it actually starts with a little paragraph before that: Duty as a peace officer. But the first right it gives them: You have the right to remain silent.

A. Yes, sir.

Q. You do not have to make any statement, oral or written, to anyone.

A. Yes, sir.

Q. Any statement you make will be used in evidence against you in a court of law at your trial.

A. Yes, sir.

Q. You have the right to have a lawyer present to advise you before and during any questioning by peace officers or attorneys

representing the State.

A. Yes, sir.

Q. You may have your own lawyer present, or if you are too poor to hire a lawyer, then the Court will appoint a lawyer for you free of charge now or at any other time.

A. Yes, sir.

Q. If you decide to talk to anyone you can, or you can stop talking to them at any time you want.

A. Yes, sir.

Q. The above rights are continuing rights which can be urged by you at any stage of the proceedings.

A. Yes, sir.

Q. And then finally, the last sentence: Do you understand these rights I have just read to you.

A. Right. Yes, sir.

Q. And that's the end of that card.

A. That's the end of that card.

Q. Okay. And that is the card that you read to, or did you show it to him?

A. No. We read it to him.

Q. You read this card to Bruce Fernandez on October 21st, 1994.

A. Four.

Q. Okay. And then you asked him if he understood those rights, as it says at the bottom?

A. Yes, sir. We did.

Q. And then you asked him what is it, you know, what do you know about this murder?

A. Give us the story.

Q. Or about this death?

A. Yes.

Q. And about this robbery?

A. Yes, sir.

Q. Okay. And he gave you a, what, a narrative statement or did you go through and ask him particular questions?

A. Just narrative. His version of what happened.

Q. In response to the question: What do you know about this robbery?

A. Yes.

Q. What do you know about what happened last night, right, because at this time it was the day after the robbery?

A. Yes, sir.

Q. Okay. So in response to that question, he then gives you the statement. Okay.

Then, and only then, you all get out --

and then you said earlier, though, you testified earlier that on that date, October 21st, you did clear up a few points with him before you went to create State's Exhibit 47.

A. Yes, sir.

Q. Okay. And you cleared those up by asking specific questions?

A. Yes, sir.

Q. And did you say, I don't know, after you all had agreed on what had actually happened, did you say like you might want to say it this way or make sure you put that in your statement?

A. No.

Q. Okay. You just asked him a specific question?

A. And used the answer.

Q. And he would give you the answer?

A. Yes, sir.

Q. And then you said: All right. Now, I want -- or no, you didn't let him read this form yet. You said: I've got a form here I'm putting in the typewriter; tell me again?

A. Yeah.

Q. And he told you again?

A. Yes, sir. He did.

Q. Okay. And then you gave him this form?
A. Yes, sir.
Q. And then he read this form?
A. Yes, sir.
Q. And then he made all these initials on it?
A. Yes, sir.
Q. And then and only then he signed it?
A. Yes, sir.
Q. Thank you. Going back to the date of November 1st, which is a couple of weeks later when he's in jail, Bruce Fernandez was in the custody at that time of the Bexar County sheriff?
A. Yes, sir, he was.
Q. And you were acting in your capacity as a peace officer?
A. Yes, sir, I was.
Q. And he didn't call you and set up this interview, did he?
A. No, sir. He did not.
Q. In fact, you called him? In fact, you didn't call him at all?
A. No, sir. We did not.
Q. The first thing he knows, he's taken out of the jail where he's been for two weeks and he ends up over at the CID offices, did you say?

A. Yes, sir.

Q. And in comes the man who he had given a statement to before, who he knows to be a police officer?

A. Yes.

Q. And says: I don't believe what you told me, correct?

A. Correct.

Q. I'm going to give you one more chance?

A. No.

Q. I'm sorry?

A. No.

Q. I thought you testified earlier that he did say: I'm going to give you one more chance to tell me the truth.

A. I don't believe I testified to that.

Q. I'm sorry. It will be in the record. I just thought you had testified to that. But you said I don't believe you?

A. Yes, sir. I did tell him I didn't believe his statement.

Q. Okay. And I am going to give you a chance to take the polygraph?

A. Well, no, sir. I told him I didn't believe him the day we took the initial statement.

Q. I'm sorry. Okay. And then you put him in jail?

A. Then he went in jail on the warrant. We executed the warrant and he went to jail.

Q. Executed the warrant. Now, when you say executed, what time was this warrant issued?

A. Just prior to our meeting with him.

Q. And when you say the warrant, this is an arrest warrant for the arrest of Bruce Fernandez?

A. Yes, sir.

Q. Let me ask you this: When his mother called, did she know there was a warrant?

A. No, sir.

Q. Okay. Going back to, then -- I'll come back to that, but let's go back to November 1st again. And you said: I will give you an opportunity to take a polygraph test?

A. Yes, sir.

Q. You said this to the Defendant?

A. Yes, sir.

Q. You don't have to if you don't want to?

A. Yes, sir.

Q. You didn't read him his Miranda rights?

A. Not initially. No, sir.

Q. Not before he took the polygraph test?

A. No, sir.

Q. Did you call his lawyer?

A. No, sir.

Q. You didn't ask his lawyer if he could take that polygraph test?

A. No, sir. I did not.

Q. His lawyer was not present during the polygraph test, correct?

A. No, sir. He was not.

Q. His lawyer was not present during the questioning that followed that polygraph test?

A. No, sir.

Q. Did you look on the computer to see if he had yet been assigned a lawyer?

A. No, I did not myself. No.

Q. Who did?

A. I asked them if they had --

Q. I'm sorry?

A. I asked the clerk there at the -- the CID office secretary if he had an attorney, and she said she didn't think so at that time. She checked. I didn't verify it or validate it. No.

Q. You did not verify it?

A. No.

Q. Okay. You said that -- and that was

because you were trying -- you thought that you could rely on the statements of another agent of the State, correct?

A. Yes.

Q. And rely on her knowledge?

A. Yes, sir.

Q. By the same token, you are imputed with the knowledge of all other agents of the State, are you not?

A. Yes, sir.

Q. You understand the legal ramifications of that?

A. Yeah.

Q. And so even though Bruce Fernandez had not asked you specifically for a lawyer, I think you would agree with me, would you not, that if he had asked anybody for a lawyer before that day, just asked for the lawyer, whether or not they had been appointed, then you understand that you cannot talk to him after that; is that correct?

A. If I was aware of that. Yes, sir.

Q. But you are imputed with the knowledge of all other agents of the State; is that correct?

A. With the knowledge of it. Yes, sir.

Q. Okay. So that if he had asked any agent

of the State, then is it your understanding of your duty to then cease any contact with that defendant?

A. If I had knowledge of it. Yes, sir.

Q. Okay. And furthermore, that he cannot, without the presence of that lawyer, he can't then waive that right. Is that your understanding of the law?

MS. PARKER: Your Honor, I'm going to object. That's not the state of the law. He has to ask for his lawyer.

MR. FAHLE: Minnick, Your Honor, is the case. United States Supreme Court. M-I-N-N-I-C-K. Once the Defendant has requested a lawyer, he can no longer waive that right without the presence of a lawyer.

THE COURT: What's the objection?

MS. PARKER: He's asking him what the law is about appointing a lawyer or having a lawyer. First of all, I don't think he's qualified to talk about what the state of the law is on that issue.

MR. FAHLE: I apologize, Your Honor. I was asking what his understanding of the law is on that matter.

THE COURT: Okay. Go ahead.

Q. (By Mr. Fahle) Is that your understanding of the law? You take -- let me just back up a little bit before we get there. You said, in response to one of the prosecutor's questions, that you have had extensive training as a law enforcement officer.

A. Yes, sir.

Q. That you have done this for how long?

A. Twenty-three years.

Q. Twenty-three years. In that 23 years, you didn't get all your training at the beginning of that 23 years, did you?

A. No, sir.

Q. In fact, you take continuing education classes all the time; do you not?

A. Yes, sir.

Q. Refresher courses, that sort of thing?

A. Yes, sir.

Q. Offered both by the Police Academy?

A. Yes, sir.

Q. And by, what, trade associations?

A. Yes, sir.

Q. And by -- do you take any college courses?

A. No. I haven't taken any in years.

Q. In years. Okay. But you do, nevertheless, try to keep abreast of developments in

the law?

A. Yes, sir, I do.

Q. And you try to keep abreast of the state of the law and how that might affect your investigations?

A. Yes, sir.

Q. Okay. Is it your understanding of the law that once somebody has requested an attorney, you may no longer speak to them without an attorney present, even if they waive that right or try to waive it?

A. It was my understanding that as long as I was aware, I was told that somebody had denied or declined to waive that right, that I had to respect that right. Yes, sir.

Q. Okay. And just so we're clear, before that polygraph examination, you didn't even ask him if he wanted his lawyer present?

A. No, sir. I did not Mirandize him before that.

Q. You did not ask the Defendant?

A. No, sir.

Q. And he did not affirmatively waive that right or even attempt to?

A. No, sir. He could have declined to take the test.

Q. He could have declined to take the test. I'm sorry. I'm not trying to trick you. I'm saying he did not affirmatively say: I don't want my lawyer here?

A. Exactly. Yes, sir.

Q. Okay. One other thing. Before the questioning that took place, after that took place, after the polygraph examination you went back in and you questioned him and you said: You're lying. You're not telling me the truth.

MS. PARKER: Your Honor, I didn't get his last question. Can you repeat it?

MR. FAHLE: No. I wasn't finished. I'm sorry.

Q. (By Mr. Fahle) The questioning that took place after the polygraph examination.

A. Okay.

Q. And before he signed State's Exhibit 48 -- State's Exhibit 48, which is the second statement, he did not affirmatively represent to you that he did not want his lawyer; correct?

A. No, sir. That's not. He did.

Q. He did?

A. Yes, sir.

Q. In what way did he do that?

A. He was read those rights before we took that second statement.

Q. Oh, I'm sorry. Read those rights. You mean he was read what's on Defendant's Exhibit 4?

A. No, sir. It's on the statement form itself.

Q. Uh-huh. So this time, unlike the other time, unlike on October 21st, on November 1st you decided to read him the form first. You decided, before I ask you any questions, I'm going to read you the form?

A. Yes, sir. Because that was done on a typewriter versus a word processor computer.

Q. Okay. And then after you read him this form, the form which is Defendant's Exhibit 48, but just read him the blank part of the form, you then asked him: Do you understand what I just read to you?

A. Yes, sir.

Q. And he said yeah?

A. Yes. And he gave his statement. He had already given it.

Q. Okay. He had already given it?

A. And then we typed it.

Q. And then you typed it. Okay. I'm sorry. That's where I was unclear. Before the questioning

started, though --

A. He was Mirandized.

Q. But he had not signed this form.

A. He had not signed it.

Q. Okay. And you hadn't read him this form, this form itself?

A. Yeah. He was aware of the rights. We read the rights before we even began the questioning.

Q. No. I know.

A. Off of that.

Q. You read them off of this?

A. Off of this form. I had this form with me and this is the form that we used. He was made aware of these prior to questioning, to converting into written statement.

Q. Okay. And when you say off of this, you're talking about State's Exhibit 48, the second statement?

A. I'm assuming that's what it is. Yes, sir. This statement right here.

Q. Okay. That was read to him?

A. Yes, sir.

Q. Before. And I'm sorry I'm harping on this, but I'm trying to get exactly how things occurred.

A. Yes, sir.

Q. Okay. And then you said: Do you understand that? Do you know what you're doing here? Do you understand what I just read to you?

A. Yes, sir.

Q. And he said yes?

A. And he said yes.

Q. Then he gave the statement?

A. Yes, sir.

Q. And then he initialed, made changes?

A. And then signed it.

Q. And then signed it. Okay. Let me ask you this: At the very top of the page, on State's Exhibit -- I'll get the original, the one that's actually the exhibit. I don't want you to think that I'm trying to pull anything over. At the very top of the page on State's Exhibit 48, you see some initials B.F.

A. Uh-huh.

Q. Who put those there?

A. He did.

Q. He did that? And then B.F. again above the word car?

A. That's the correction of the word before car. I probably misspelled it or transposed letters.

Q. Okay. He put those initials there?

A. Yes, sir.

Q. And he put the initials down here on the bottom at the right?

A. Yes, sir.

Q. He did all of those things; is that correct?

A. Yes, sir.

Q. Okay. Which was after the whole statement had been taken?

A. Yes, sir.

Q. After the questioning, et cetera?

A. Yes, sir.

Q. When did he put his signature on there?

A. I have no idea, sir. It was after -- this was our starting time, and we talked, wrote it, he corrected it and signed it. So it could have been 30 or 40 minutes.

Q. So 1345 was the time you got started?

A. Yes, sir.

Q. So it could have been as late as 2:30 by the time you got finished?

A. Probably, yeah. Could have been. Possibly.

Q. 2:30 in the afternoon?

A. Possibly.

Q. And that's when he signed this?

A. Yes, sir.

Q. Okay. At no time was his lawyer -- Do you know Ms. Kramer here?

A. No, I don't. I met her today. Before that, no.

Q. Okay. At no time was she present during this?

A. No.

Q. At no time was any lawyer present in that room?

A. Correct. No lawyers were in that room.

Q. For the State or otherwise?

A. Otherwise, yes, sir.

MR. FAHLE: Pass the witness, Your Honor.

VOIR DIRE EXAMINATION

BY MS. PARKER:

Q. Detective Davis, I have a few more questions for you. At the time of the first statement on October 21st of 1994, was the Defendant under arrest at the time he gave that statement?

A. No, ma'am. He was not.

Q. After he gave that statement, did you arrest him?

A. Yes, ma'am, we did.

Q. What did you arrest him for?

A. Negligent homicide.

Q. And that was what the warrant you've been talking about was for?

A. Yes, ma'am.

Q. At the time that Bruce Fernandez gave his second statement on November 1st of 1994, what was he in custody for?

A. For the negligent homicide.

Q. Had he been charged with aggravated robbery at that time?

A. I don't remember the date I filed that. I filed the aggravated robbery at large, and I don't remember the day I filed it.

Q. Okay. But there were no charges pending?

A. No.

Q. In the aggravated robbery at the time that you took the statement from Bruce Fernandez on November 1st of 1994?

A. No, ma'am.

Q. Okay. Do you have your file with you where you can tell what date you filed the aggravated robbery with our office?

A. Yes, ma'am, I do.

Q. Do you have that with you up there?

A. No, ma'am, I don't. It's in the bailiff's office.

MS. PARKER: Your Honor, can we get that file so he may refresh his memory?

THE COURT: Which file?

MS. PARKER: His own personal file that he brought with him.

THE COURT: Oh, yes. Where is it?

MS. PARKER: It's in the bailiff's office.

THE COURT: Okay. Tell the jury we'll be tied up for another 30 minutes or so, that they can go downstairs and have coffee. Tell them to go down there and be back at 10:30.

Q. (By Ms. Parker) Detective, if you can't find it, let me ask you this --

A. I can't find it. The charge and the disposition report is normally in the file.

Q. Can you tell me what an at-large case is?

A. At-large case is where we've made a case and we present the case to the district attorney's office; they review the case, and if there's sufficient evidence to prove the case, they'll accept it. We file it with the case. A warrant comes out;

they arrest the subject; he's then either bonded out or kept in jail, and the case is set. But it's a case where we don't physically arrest the subject and put him in jail ourselves.

Q. Do you know how the warrant for an at-large case is generated? Is it generated by the grand jury or by a law enforcement agency?

A. On an at-large?

Q. Uh-huh.

A. It's by the grand jury.

Q. And do you know whether or not you filed the aggravated robbery charge after the statement that you took on November 1st of 1994?

A. I don't know. It's been too long. No, ma'am, I don't. That would be the normal timing of it, but I can't swear to it.

Q. But at the time you interviewed Bruce Fernandez on November 1st of 1994, there were no aggravated robbery charges pending?

A. At that time, no, ma'am. I don't believe I had filed them yet.

Q. And he was in jail on the criminally negligent homicide?

A. Criminally negligent homicide.

Q. At the time that you took the second

statement, after Mr. Fernandez took the polygraph test, did he voluntarily give you a statement?

A. Yes, ma'am, he did.

Q. And did you advise him of all of his constitutional rights?

A. Yes, ma'am.

Q. At any time did he say: I have a lawyer and I want to call her?

A. No, ma'am. He did not. We would have stopped right then and there. He did not.

Q. Were you trying to deceive Mr. Fernandez by offering him a polygraph test?

A. No, ma'am. By no means.

Q. In fact, at the time you took the first statement on October 21st, 1994, did you tell Mr. Fernandez that you would give him a polygraph test if he wanted?

A. Yes, ma'am. I told him then I would make it available.

Q. Have you ever done that in any other cases?

A. Sure.

Q. At the time, on October 21st of 1994, did Mr. Fernandez indicate that he would be willing to take a polygraph test?

A. Sure. He said yes. He had nothing to hide.

Q. So, you set it up some ten days later on November 1st, 1994?

A. Yes, I did.

Q. And did you speak with Mr. Fernandez before he took the polygraph?

A. Very briefly.

Q. Did he go into a private room with the polygraph examiner?

A. Yes, ma'am, he did.

Q. And you were not in there?

A. No, ma'am. Just the two of them.

MR. FAHLE: Your Honor, I'm sorry. I sat here and listened to a lot of leading questions and I can see why they would want to lead this witness now. I would ask the Court to instruct them not to do so.

THE COURT: Don't lead your witness.

Q. (By Ms. Parker) Who was in the polygraph room with the polygraph examiner and Bruce Fernandez?

A. Bruce and a polygraph examiner by the name of Frank Robinson.

Q. To your knowledge, was anybody else in the room?

A. No.

Q. And you were not in the room?

A. No, ma'am.

Q. Did you see Bruce Fernandez walk into the room to take the polygraph test?

A. Yes, ma'am, I did.

Q. Did he walk in of his own free will?

A. Yes, ma'am, he did.

Q. And when he came out, what did you do? When he came out of the polygraph.

A. When Bruce came out?

Q. Yes.

A. He initially did not come out of the polygraph room. The examiner came out, briefed me, and then I went into the room and spoke with Bruce.

Q. At that time, did he agree to give you a second statement?

A. Yes, ma'am, he did.

Q. Did you read him his rights again?

A. That's when he was apprised of his rights. Yes, ma'am.

Q. Did he indicate that he understood them?

A. Yes, ma'am.

Q. Then he gave you a statement?

A. Yes, ma'am.

Q. And then he carefully read it and made any additions or changes that he wanted?

A. I'm assuming he did. It was given to him and he was advised to read it and make corrections.

Q. Did Bruce Fernandez knowingly, intentionally and voluntarily waive his constitutional rights before giving you either of the statements?

A. Yes, ma'am. He indicated so verbally.

MS. PARKER: Thank you. Pass the witness.

VOIR DIRE EXAMINATION

BY MR. FAHLE:

Q. What you testified to a few minutes ago, Officer, if I'm not mistaken, or Detective, when I had you on cross last time, you testified that you -- that Bruce Fernandez didn't know anything about this polygraph until you set it up. He didn't know why he was there; is that correct?

A. The day of the polygraph, he did not know that we were coming.

Q. Okay. And he didn't know it was going to happen either, did he?

A. He was told the day of the first statement that if he would like, I would make a polygraph available to him. At that time, he said, yes, no

problem. I've got nothing to hide. So he had been told that day that a polygraph would be made available in the future. He did not know the day that we got there that we were coming that specific day.

Q. And so that's why you had to remind him that you thought he had lied and, therefore, you were making this polygraph available for him?

A. I didn't remind him that day that he had lied. I told him in the initial statement that I didn't believe it. The day that he took the polygraph, I said nothing about --

Q. Okay. I apologize. And then -- but you didn't say anything about, well, of course, if you have a court-appointed attorney, that attorney can be present at that polygraph, when you first talked to him, did you?

A. No.

Q. Back on October 21st?

A. No.

Q. And you didn't say on November 1st, by the way, your lawyer can be here for this polygraph, did you?

A. No.

Q. And he didn't say: I don't want my lawyer. We already covered all of that, right?

A. Right.

Q. You're not changing that?

A. No.

Q. Okay. That's right. Let me show you this. Showing you what's been marked State's Exhibit number 43, and this is your statement regarding this, correct?

A. Yes, sir. Supplemental reports. Yes, sir.

Q. Now, whether or not there were -- Ms. Parker asked you if there were any aggravated robbery charges pending on November 1st.

A. Yes, sir.

Q. And you answered that there were not.

A. No. They were not pending. They were under investigation.

Q. Okay. What does pending mean?

A. Prepared to file.

Q. Prepared to file. Okay. But what had happened is you had sworn out a warrant, correct, for the arrest of Bruce Fernandez?

A. On negligent homicide.

Q. You had sworn out a warrant, correct?

A. Yes, sir.

Q. And in that -- do you have that? Do you

have the affidavit that supports that warrant by any chance?

A. The probable cause affidavit? I've got a copy of it. I'm sure that they have one also.

Q. Thank you, sir.

A. That's an original.

MR. FAHLE: Your Honor, may I have a second to make a copy of this so I can give him back his original?

THE COURT: Give it to the bailiff.

MR. FAHLE: Thank you.

(Marked Defendant's Exhibit No. 5 for identification.)

MS. PARKER: There should be another stapler up there.

MR. FAHLE: May I have just a second to look at this, Your Honor?

Q. (By Mr. Fahle) Showing you what's been marked as Defendant's Exhibit 5, could you identify that for the Court, please?

A. That's my probable cause affidavit for the arrest warrant.

Q. For the arrest warrant?

A. Yes, sir.

Q. And is that your signature on the back

page?

A. Yes, sir, it is; on top.

Q. And that's a sworn affidavit?

A. Yes, sir, it is.

Q. Okay. And it is sworn before the magistrate?

A. Yes, sir, it was.

Q. That was at?

A. 5:50 p.m.

Q. On?

A. 10-21-94.

Q. Which would be?

A. October 21st, 1994.

Q. Okay.

MS. PARKER: Are you offering it?

MR. FAHLE: Yeah.

MS. PARKER: We have no objection for purposes of the hearing.

MR. FAHLE: We'd offer Defendant's Exhibit 5 for the purposes of the hearing, Your Honor.

THE COURT: Defendant's Exhibit number 5 will be admitted into evidence; no objections.

Q. (By Mr. Fahle) Showing you again what's been marked as Defendant's Exhibit 5, it states on

here, does it not, at the end of paragraph one, at the end of Roman I, see offense report for further details.

A. Uh-huh. Yes, sir, it does.

Q. And at the end of Roman II, see statement for further details.

A. Yes, sir.

Q. Okay. And so you intended -- you give this probable cause affidavit to the magistrate, correct?

A. Yes, sir.

Q. And he reads that in order to determine whether there's probable cause to issue a warrant for the arrest of Bruce Fernandez?

A. Yes, sir.

Q. That's what this was for?

A. Yes, sir.

Q. And so you intended to make available to the magistrate, should he ask, you incorporated these other documents by reference?

A. Yes, sir.

Q. So when you say see offense report, can you take a look at State's Exhibit 43 and show us -- are these all the reports that you've written on this case?

A. That I myself wrote, yes, sir.

Q. Okay. Were you referring to any of those reports?

A. No, sir.

Q. You were not referring to the report in State's Exhibit 43?

A. No, sir.

Q. What were you referring to in Defendant's Exhibit 5, at the end of Roman I, see offense report?

A. The initial report written by patrol officers, responding officers, street officers.

Q. Do you remember who those were?

A. Sergeant DeLeon and Patrolman Bennett.

THE COURT: John, I'm going to take a one-minute recess.

(Brief recess.)

MR. FAHLE: I'm sorry, Your Honor.

THE COURT: That's all right. Go ahead.

Q. (By Mr. Fahle) Right. I remember. Sorry. Showing you, then -- I'm sorry. You said it was Mr. DeLeon's report, and who was the other one?

A. Officer Bennett.

Q. Bennett. And those were incorporated by reference as part of and made part and parcel of this

document?

A. Yes, sir.

Q. You said yes?

A. Yes, sir.

Q. (By Mr. Fahle) Showing you what's been marked State's Exhibit 30, can you tell us what that is, please, sir?

A. That's the offense report for aggravated robbery.

Q. For aggravated robbery?

A. Yes, sir.

Q. Who wrote that report?

A. Sergeant DeLeon.

Q. Sergeant DeLeon? Is that report, Sergeant DeLeon's report, the report you refer to in Defendant's Exhibit 5 at the end of paragraph -- is that one of the reports you refer to in Defendant's Exhibit 5 at the end of paragraph one?

A. Yes, sir.

Q. Okay. And so you adopted this as your own statement; in other words, you swore to the magistrate that everything in not only the probable cause affidavit, but also to the best of your knowledge everything in here?

A. Yes.

Q. In State's Exhibit 30 was correct?

A. Yes, sir.

Q. Okay. Showing you what's been marked as State's Exhibit 31. Would you look at that and tell us what it is?

A. It's the offense report written by Sergeant DeLeon.

Q. Had you read that prior to writing Defendant's Exhibit 5?

A. Yes, sir, I did.

Q. Is that one of the reports that you refer to at the end of paragraph one of Defendant's Exhibit 5?

A. Yes, sir.

Q. And you adopted that report -- when I say that report, State's Exhibit 31 -- as your own for purposes of the probable cause affidavit?

A. Yes, sir.

Q. Okay. And you were vouching for the accuracy of that statement also?

A. Yes, sir.

Q. And then showing you last what's been marked as State's Exhibit 36; do you recognize that?

A. Yes, sir. That's Officer Bennett's report.

Q. Officer Bennett's report?

A. Yes, sir.

Q. Okay. And again, did you read this before you wrote Defendant's Exhibit 5?

A. Yes, sir.

Q. And is that one of the documents that you refer to at the end of paragraph one of Defendant's Exhibit 5?

A. Yes, sir, it is.

Q. You, therefore, adopted that as your own?

A. Yes, sir.

Q. For purposes of the probable cause affidavit?

A. Yes, sir.

Q. And swore to the truth and accuracy of it?

A. Yes, sir.

Q. Okay. And one other thing: Is that all of the reports that you were referring to at the end of paragraph one of Defendant's Exhibit 5?

A. Yes, sir. At the time, yes, sir.

Q. Okay.

MS. PARKER: I'm going to object. I don't think that they're relevant to this proceeding. We're here on a Jackson v. Denno hearing. These are offense reports to support

an affidavit for a crime for which Mr. Fernandez is not on trial for during this trial.

MR. FAHLE: May I respond, Your Honor? First, I would offer into evidence for purposes of this hearing, limited purposes of this hearing, State's Exhibits 36, 31 and 30. And then in response to the anticipatory objection, I would simply argue that these are part of the probable cause affidavit. These have been made part and parcel of the probable cause affidavit that this witness -- which is already in evidence, by the way, and this witness said these have been adopted by reference and are part of that document, Defendant's Exhibit 5.

He testified that there were no charges pending, whatever pending means, for aggravated robbery. What I'm trying to show, and the relevance of this -- I think the relevance of it ought to be pretty obvious, what they were doing here was a joint investigation, just like this has been a joint prosecution and just like the State said, this is all basically one offense. These ain't separate, segregated facts. This is one offense. They argued that at our Motion in Limine on 404(b). And now

they're stuck with it. These are all one offense. What they were investigating here was an aggravated robbery, slash, criminally negligent homicide. The Court has already ruled that that's not an extraneous offense; that from the time that they got in the car and started following that truck until the driver died was one offense. I would therefore --

THE COURT: The objection will be overruled. You make copies of it. For purposes of this hearing, you can introduce those.

MR. FAHLE: These are admitted?

THE COURT: Yes.

MS. PARKER: For the purposes of this hearing?

THE COURT: Yes.

MR. FAHLE: Do you need copies?

MR. DIMALINE: We can get copies. Go ahead.

Q. (By Mr. Fahle) Now, Officer, showing you again Defendant's 5, State's 31, State's 30, and State 36 -- Oh, I'm sorry. Then we look down here at paragraph two, Roman II, and this talks about the statements of the accomplices, correct?

A. Yes, sir.

Q. And that's statements of both accomplices, Rudy Ybarra, correct?

A. Yes, sir.

Q. And Carlos Garibay?

A. Yes.

Q. Okay. And those statements, you say in there, in the probable cause affidavit itself you say that those statements stated that a fourth accomplice identified as Bruce Fernandez, the Defendant in this case, gives a date of birth, had executed the aggravated robbery. And while in the process of trying to enter a vehicle driven by the victim, accidentally fired a handgun striking the victim in the head, causing the death of the victim.

A. Yes, sir.

Q. Then you say: See statement for further details.

A. Yes, sir.

Q. Okay. Now, by the same token, you've read -- and we're talking about the statements of Garibay and --

A. Ybarra.

Q. Ybarra. Thank you.

(Marked Defendant's Exhibit No. 6 for identification.)

Q. (By Mr. Fahle) I show you what's been marked as Defendant's Exhibit 6, and can you tell us if you've seen that before?

A. Yes, sir.

Q. Can you tell us what that is, please?

A. It's a statement, voluntary statement given to me by Carlos Garibay.

Q. Okay. On October 21st, 199- --

A. Four.

Q. Four. Had you read that statement prior to writing and swearing to Defendant's Exhibit 5?

A. Yes, sir.

Q. Okay. Is that one of the statements you refer to at the end of paragraph two of Defendant's Exhibit 5?

A. Yes, sir.

THE COURT: What's the date of that statement?

THE WITNESS: October 21st, 1994, sir.

Q. (By Mr. Fahle) Okay. And so that, by the same token, was adopted by reference into Defendant's Exhibit 5; correct?

A. Yes, sir.

Q. And let me see that one just a second. And so you, at least at that time, had adopted this

statement as your own?

A. Yes, sir.

Q. And vouched for the truth and accuracy of it?

A. Yes, sir.

Q. Okay. Showing you what's been marked as State's Exhibit 3 -- might as well do them both, State's Exhibits 2 and 3. Can you tell us what those are, please?

A. These are two different statements given to me by Rudolfo Ybarra.

Q. Okay. He was a co-defendant in this case?

A. Yes, sir, he was.

Q. He was on the stand here yesterday?

A. I'm assuming he was. I didn't --

Q. Okay. And you understand that that person has since pled guilty; correct, to this offense?

A. Yes. Yes.

Q. I'm asking, do you know that?

A. Yes, sir. I do know that he did plead guilty.

Q. Are those two of the statements, State's 3 and 2, are those two of the statements that you were referring to in Defendant's Exhibit 5 at the bottom of paragraph two?

A. I was referring to the correct statement, not the one --

Q. By the correct statement, you mean what?

A. The second statement that Mr. Ybarra gave me.

Q. Which one of these exhibits is that?

A. It's this one here.

Q. State's Exhibit 2?

A. Yes, sir.

Q. Okay. You did not believe nor vouch for the accuracy of State's Exhibit 3, correct?

A. No, sir.

Q. But as for State's Exhibit 2, at least at that time you believed what was in the statement?

A. A good portion of it. Yes, sir.

Q. A good portion of it you believed the substance of it?

A. Yes, sir.

Q. And you adopted it as your own for purposes of the probable cause affidavit?

A. Yes, sir.

Q. And swore to the accuracy of that statement to the best of your knowledge?

A. Yes, sir.

Q. Okay.

MR. FAHLE: We move, Your Honor, for -- I'm sorry.

Q. (By Mr. Fahle) Now, we've got Defendant's Exhibits 2 and 6. Are these the only -- first I'll ask you one more time, are each of these Defendant's 6 and State's 2, part and parcel of what you were referring to in paragraph two of Defendant's Exhibit 5 when it says see statements?

A. Yes, sir.

Q. Both of those were?

A. Yes, sir.

Q. Are these the only statements that you were referring to at the end of paragraph two of Defendant's Exhibit 5?

A. Yes, sir.

Q. Okay. Thank you.

MR. FAHLE: Your Honor, we move for the admission of Defendant's Exhibit 6 and State's Exhibit 2, for the limited purposes of this hearing.

MS. PARKER: We have no objection, for the limited purpose of the hearing.

THE COURT: Defendant's Exhibit 6 and State's Exhibit number 2 have been introduced by the defense and will be admitted into evidence.

MR. FAHLE: These are admitted, Your Honor?

THE COURT: Yes.

Q. (By Mr. Fahle) Let me ask you this: All the exhibits we've just gone through, State's Exhibit 2, Defendant's Exhibit 6, State's Exhibit 30, State's Exhibit 31, State's Exhibit 36, are all part and parcel of Defendant's Exhibit 5?

A. Yes, sir.

Q. Adopted by reference?

A. Yes, sir.

Q. And intended by you to be used in making a determination of probable cause that the magistrate had to make in order to issue a warrant for the arrest of Bruce Fernandez?

A. Yes, sir.

Q. You were investigating Bruce Fernandez for armed robbery, correct?

A. At that time, no.

Q. No? Not at all?

A. Negligent homicide. I had a feeling that he was involved in it, but the initial primary case was the negligent homicide.

Q. Well, we know that you submitted Defendant's Exhibit 5 to the magistrate before you

talked to Bruce Fernandez on October 20th, right? Or 21st, sorry.

A. Yes.

Q. We're not sure exactly what time, but we know it was before that, correct?

A. Correct.

Q. In fact, we are sure exactly what time, 5:50 p.m., correct?

A. Correct.

Q. And so we know that you not only had a feeling that he was involved in an armed robbery, but that you swore before the magistrate that he was, in fact, involved in an armed robbery; correct?

A. Correct. As worded in the report.

Q. It's more than worded in the report. Each report and each affidavit, you've already testified, was adopted as your own sworn statement.

A. Okay.

Q. Therefore, you swore before the magistrate that Bruce Fernandez was involved in an armed robbery -- not involved, committed armed robbery of Jeffrey Morehouse on October 20th, 1994; correct?

A. Correct.

Q. Did you talk to any reporters about this case, ever?

A. Yes, sir.

Q. Okay. Can you tell me who you talked to?

A. No, sir. I have no idea.

Q. Did you talk to anyone from The Express-News?

A. I'm sure I did.

Q. Okay. Would it refresh your memory to show you --

MR. FAHLE: Let me get this marked.

(Marked Defendant's Exhibit No. 7 for identification.)

Q. (By Mr. Fahle) I'm going to show you what's been marked as Defendant's Exhibit 7, and ask you if that helps refresh your memory as to the names of any reporters you may have spoken to?

A. No. I'm assuming that's who it was. I don't remember the reporters by name.

Q. You read this article after it came out in the paper?

A. I'm sure I did. Yes, sir. I pretty much kept up with what was in the paper.

Q. I guess I better take this step by step. I'm showing you what's been marked as Defendant's Exhibit 7. Can you tell me if you recognize that and what it is?

A. It's a newspaper article.

Q. From the San Antonio Express news, or purports to be?

A. Yes, sir.

Q. Does it appear to be one article?

A. Yes, sir. And a second article.

Q. And there's a second article, both apparently, or purportedly to be by the same author, Chris Bird, of The Express-News?

A. Yes, sir.

Q. And you read these before -- I'm sorry -- before today you read these?

A. I'm assuming I did. I can't swear to reading that specific article.

Q. But to the best of your knowledge?

A. To the best of my knowledge, yes, we did keep up with the articles that came out in the paper.

Q. Were you at all unhappy with the press's handling of this case?

A. It made me no difference.

MS. PARKER: Your Honor, I'm going to object. This is not relevant.

THE COURT: I sustain the objection. We're getting far afield, John. We're having a Jackson/Denno hearing. You're going --

MR. FAHLE: Your Honor, I'm simply trying to establish that -- well, I apologize. You've sustained the objection.

MR. FAHLE: One last thing, and I'm almost through with this witness, Your Honor, but I did have just one other question, please.

Q. (By Mr. Fahle) Let me ask you one other thing: Looking at Defendant's Exhibit 7, are any of the statements in there that you know of attributed to you by the reporter? Take your time.

MS. PARKER: Your Honor, I'm going to object. What is the relevance of that? We don't know when this newspaper article was written or anything.

MR. FAHLE: We're about to find out, Your Honor, and if it's an admission of a party opponent --

THE COURT: What does it have to do with whether or not the statements were freely and voluntarily made?

MR. FAHLE: Because, Your Honor, it goes to whether or not he was -- I mean, I think where the State is trying to go with this is that these are different offenses and the witness has testified that there were no charges

pending for criminally negligent -- sorry -- for aggravated robbery, and they're going to somehow say that, therefore, his right to an attorney didn't attach. But what I'm trying to show, Judge, is this is all one investigation. You've got an attorney for one thing, you've got it for all of them, because it's all the same facts.

THE COURT: But I don't understand about those newspaper clippings.

MR. FAHLE: Well, if any of the statements in here are his and he says we're investigating this guy for aggravated robbery, that's an admission of a party opponent, showing that they were, in fact, investigating him for aggravated robbery.

Q. (By Mr. Fahle) Did you find any statements in there?

A. No.

Q. One last thing.

(Marked Defendant's Exhibit No. 8 for identification.)

Q. (By Mr. Fahle) Have you seen the indictments against Bruce Fernandez in this or any other case?

A. No, sir.

Q. Let me show you what has been marked as Defense Exhibit 8 and see if you can tell us what that is.

A. True Bill of Indictment.

Q. Who is the indictee? Who is the Defendant in that case?

A. Bruce Fernandez.

Q. Okay.

MR. FAHLE: Your Honor, may I ask the bailiff to make me one more copy?

THE COURT: You may.

Q. (By Mr. Fahle) What's the date that the grand jury returned that indictment?

A. It's like January 25th, 1995.

Q. Okay. That is for aggravated robbery with a deadly weapon?

A. Yes, sir, it is.

Q. Okay. And that cause number is 95-CR-0391; correct?

A. Yes, sir.

Q. To the best of your knowledge, that's the case that we're trying right now?

A. Yes, sir.

Q. It would appear to be. It charges aggravated robbery on the 20th of October, 1994;

correct?

A. Yes, sir.

Q. Against Bruce Fernandez?

A. Against Bruce Fernandez.

Q. And then furthermore, charges a second aggravated robbery, this one of Diana Morehouse; the first one being of Jeffrey Morehouse, again on October 20th, 1994?

A. Yes, sir.

Q. Against Bruce Fernandez?

A. Yes, sir.

Q. That would appear to be this case. But in any event, that's the aggravated robbery charge.

A. Yes, sir.

Q. Okay.

MR. FAHLE: Your Honor, just for the limited purpose of this hearing, I would ask that the Court take judicial notice of the indictment in this case, which has been marked as Defendant's Exhibit 8.

THE COURT: Okay. The Court will do that, take judicial notice. What is it; DX what?

MR. FAHLE: DX-8.

THE COURT: Eight?

MR. FAHLE: Eight.

THE COURT: For the purposes of this hearing, the Court will take judicial notice of it.

(Marked Defendant's Exhibit No. 9 for identification.)

Q. (By Mr. Fahle) Showing you the last exhibit, what's been marked as Defendant's Exhibit 9, can you tell me what that is or what it appears to be?

A. True Bill of Indictment.

Q. Against whom?

A. Bruce Lee Fernandez.

Q. The Defendant in this case, correct?

A. Yes, sir.

Q. Can you tell us the date of that?

A. December 20th, 1994.

Q. Okay. And that -- what does that charge Mr. Fernandez with?

A. Criminally negligent homicide.

Q. On?

A. The 20th day of October.

Q. 1994?

A. 1994.

Q. That's cause number 94-CR-7497?

A. Yes, sir.

Q. And by shooting Jerry Lopez with a deadly weapon, namely a firearm?

A. Yes, sir.

Q. So that would appear also to be this offense, correct?

A. Yes, sir.

MR. FAHLE: Your Honor, I'd ask that the Court take judicial notice of Defendant's Exhibit 9, which is the indictment in cause number 94-CR-7497.

THE COURT: The Court will take judicial notice of it.

MR. FAHLE: Thank you, Your Honor.

THE COURT: Of the criminally negligent homicide.

MS. PARKER: And that these be admitted for the limited purpose of this hearing.

THE COURT: Yes.

MR. FAHLE: I'll leave these here with you for a second.

Q. (By Mr. Fahle) You said that on November 1st, 1994, the date of Bruce Fernandez's second statement -- is that the right date?

A. Uh-huh.

Q. That there was no aggravated robbery charge pending against him.

A. No, sir.

Q. There was a criminally negligent homicide charge pending against him.

A. That's what he was arrested for. Yes, sir.

Q. And that that charge was pending, whatever that means; correct?

A. Yes, sir.

Q. Okay. Nevertheless, looking at the dates on Defendant's Exhibits 8 and 9, these show us, do they not, that no charges were filed by the grand jury until January 25th on the ag robbery and December 20th on the criminally negligent, both of 1994?

A. Yes, sir.

Q. Both of those dates being long after the date that you had taken the statement?

A. Yes.

Q. So, by pending then, whatever pending means, it doesn't mean indicted; correct?

A. Obviously. Yes, sir.

Q. In the way that you're using that word.

A. Yes.

MS. PARKER: Your Honor, I'm going to

object. He has no personal knowledge about when the charges were pending. He just said he doesn't know.

MR. FAHLE: Your Honor, he read them from the indictments. The indictments are in evidence for purposes of this hearing.

MS. PARKER: For him to further question him about that, it's not relevant. He doesn't know.

MR. FAHLE: That's my last question, Your Honor. That is --

THE COURT: What's the question?

MR. FAHLE: The question was: Whatever pending means in his vocabulary, it doesn't mean indicted.

THE COURT: Can you answer that question?

Q. (By Mr. Fahle) Is that correct?

A. In reference to -- if I say a case is pending, it means I filed a case.

Q. Okay. But it does not mean that any indictment has been brought?

A. No.

Q. In fact --

A. Well, to my knowledge, no.

Q. It doesn't mean that the prosecutors have filed any kind of complaint or anything, when you use that word?

A. Yeah. But I would not use it in reference to the prosecutors because I have no idea where they're at.

Q. Exactly.

A. As far as I'm saying, when I say pending, I've given it to them and I'm no longer involved in the case.

Q. Okay.

MR. FAHLE: Pass the witness, Your Honor.

MS. PARKER: I don't have any more questions, but I would like to have the Court take judicial notice -- make a some copies of a couple of things from your file, if you don't mind, Judge.

THE COURT: From my file?

MS. PARKER: From the Court's file.

THE COURT: I heard you say your file.

MS. PARKER: From the Court's file. Excuse me. May Detective Davis step down?

THE COURT: Yes. Have a nice day, sir. You're excused.

MR. FAHLE: Thank you, sir.

MS. PARKER: He's not excused, though.

THE COURT: No. I mean from the witness stand. He's in your custody.

MS. PARKER: Okay.

THE COURT: Do you have any other witnesses?

MR. DIMALINE: We have Detective Davis, the bullet expert, and the medical examiner.

THE COURT: I mean for this Jackson-Denno hearing.

MR. DIMALINE: No.

MS. PARKER: No.

THE COURT: That's it on the Jackson/Denno?

MR. FAHLE: We'll have a couple of witnesses too. They'll be short.

THE COURT: Jackson/Denno.

MR. FAHLE: On Jackson, we'll also have some on the Jackson v. Denno hearing, then we'll have some --

THE COURT: Does the State rest in the Jackson/Denno?

MS. PARKER: Let me ask A.J. I think

we do, except for the copies in the Court's file.

THE COURT: Okay. What says the State on the --

MS. PARKER: Your Honor, if I can get these three papers marked and have you take judicial notice of them.

THE COURT: For the purposes of this hearing?

(Marked State's Exhibits 49 and 50 for identification.)

MS. PARKER: Your Honor, we would like you to take judicial notice of the attorney appointment 0391, which is State's Exhibit number 50, which appointed Suzanne Kramer attorney to represent Bruce Fernandez in the aggravated robbery case on July 24th of 1995.

MS. KRAMER: Your Honor --

MS. PARKER: We offer that exhibit.

MS. KRAMER: I was just going to say the computer clearly states I was appointed on the aggravated robbery on January 13th, 1995.

THE COURT: What exhibit is the aggravated robbery?

MS. PARKER: This is number 50.

THE COURT: 50? What does it say there? When she was appointed?

MS. PARKER: It says Suzanne Kramer, attorney to represent Bruce Fernandez in Cause Number 95-CR-0391, signed this the 24th of July, 1995.

THE COURT: July 24th, '95.

MS. PARKER: And the State would also like to offer State's Exhibit 49 in case number 95-CR-0391, which is a copy of the capias warrant, post indictment fugitive warrant, which was sent out on January 25th of 1995.

THE COURT: Okay.

MS. PARKER: Your Honor, both of those documents are in the Court's file. We'd like you to take judicial notice of them.

MR. FAHLE: Judge, I don't think I have any objection.

THE COURT: State's Exhibit number 50 and State's Exhibit 49, the Court will take judicial notice of. This is yours.

MS. PARKER: I'll keep it with the record.

(Marked Defendant's Exhibit No. 10 for identification.)

MR. FAHLE: Judge, I'd also ask the Court to take judicial notice of DX-10, Defendant's Exhibit 10, which is the appointment of attorney and request for appointment of counsel, and the clerk's copy of the card mailed to Ms. Kramer to let her know she's been appointed as counsel in MC -- it says MC-902067 is the cause number. It doesn't have -- the first page, the appointment of attorney does not have a cause number on it.

MS. PARKER: Can you make it clear in the record that that is the criminally negligent homicide appointment order.

MR. FAHLE: Correct. Yes. These documents are all from the file of the Court -- the Court's file on cause number --

MS. KRAMER: 94-CR-7497.

THE COURT: The Court will take judicial notice of Defendant's Exhibit number 10.

MR. FAHLE: Thank you, Your Honor.

THE COURT: All of this is for purposes of this hearing.

MS. PARKER: Your Honor, the State rests on the Jackson v. Denno hearing.

MR. FAHLE: Your Honor, the State informed me that they rested on the record. I didn't hear them. I'm sorry.

THE COURT: Yes.

MR. FAHLE: Let me call our first witness, Suzanne Kramer.

THE COURT: Let me make a notation. 10:50, the State rested.

MS. KRAMER: 10:15?

THE COURT: 50. I'm going by that clock up there. The Court will waive the oath. Your witness.

MR. FAHLE: Thank you, Your Honor.

VOIR DIRE EXAMINATION

BY MR. FAHLE:

Q. Please state your name for the record.

A. Suzanne Kramer. K-R-A-M-E-R.

Q. Tell us your occupation.

A. I'm an attorney.

Q. And you are an attorney in this case; is that correct?

A. Yes, I am.

Q. Okay. Do you represent Bruce Fernandez?

A. Yes, I do.

Q. What cases do you represent Mr. Fernandez

on?

A. I represent Mr. Fernandez on a criminally negligent homicide and an aggravated robbery.

Q. Okay. In fact, a double aggravated robbery, correct; Jeffrey Morehouse?

A. Yes. Against Jeffrey Morehouse and Diana Morehouse.

Q. And then also on the --

A. The criminally negligent homicide of Jerry Lopez.

Q. Is he retained? That is, did he retain your services?

A. No, he did not.

Q. You were appointed by the Court to represent him?

A. I was appointed by the 187th District Court.

Q. Why is that? Why did the 187th appoint an attorney for Judge Machado's court?

A. He did not. The case started in the 187th. It was transferred here because the other two co-defendants were already in this Court.

Q. Tell me when you first heard Bruce Fernandez's name?

A. The morning of November 1st, 1994.

Q. How did you come about to hear that?

A. I went into Cathy Granados' office early that morning and asked her if she had anyone that needed an attorney coming up on her docket.

Q. That's something you routinely do; is that correct?

A. Yes.

Q. You do that in a lot of courts?

A. Yes.

Q. So there was nothing special about this?

A. No.

Q. Just doing what you always do?

A. Yes.

Q. Okay. What time was that?

A. I don't know specifically what time of the morning, but it would have to be before she goes out there for the docket call. I never bother Kathy after the docket call. I always do it sometime between 8:15 and 9:00 o'clock in the morning.

Q. Okay. Between 8:15 and 9:00. And then what typically happens after that?

A. She looks to see if she has anything. She asks me if it's a case that I would want. I say yes or no. If I say yes, she fills out the appointment form and gives me a copy.

Q. Okay. When you say looks to see if she has anything, what do you mean by that?

A. She looks on her -- it depends on what she knows she has available. Sometimes she looks on her jail list and she sees if there's anyone coming up on the docket that doesn't have an attorney yet, or sometimes she just looks on the docket, because the docket will say bond or jail, and she'll look to see if there's a name there yet.

Q. Does she ever give you a case of someone -- well, let me ask you this: You said someone who doesn't have an attorney yet?

A. I didn't understand your question.

Q. You testified just a second ago that one of the things she'll look for is somebody who doesn't have an attorney yet.

A. To explain that just a little further, it's a lot easier for her to know when they're jail cases if they don't have an attorney, because that will be clearly identified in her records. If they're on bond, she's not ever sure whether or not they might have retained one. So on those cases, you usually have to wait until they're actually coming in on the docket. But with Bruce Fernandez, she knew, since he was still in jail, that he did not have an attorney,

so she appointed me way before his first docket appearance.

Q. Okay. Now, tell us how you know -- you do not have an independent recollection that that date was November 1st, do you?

A. An independent recollection, no, I do not.

Q. How do you know that it was November 1st?

A. Because I looked at the documentation that Kathy had given me, and that was in the Court's file.

Q. And you used that to refresh your memory?

A. Yes.

Q. Correct? Okay. And you did that when all of this came up this morning on the Jackson v. Denno hearing?

A. Yes.

Q. By documentation, I'm handing you -- showing you what's been marked as Defendant's Exhibit 10 and already admitted before the Court for the limited purposes of this hearing. Do you recognize those documents?

A. Yes, I do.

Q. Let me ask you to take that. Can you tell us what that is?

A. This is the appointment of attorney that Kathy Granados gave me on Bruce Fernandez.

Q. Okay. And that reflects a date on it; does it not?

A. Yes, it does.

Q. What is that date?

A. November 1st, 1994.

Q. How do you know that that wasn't entered at some different time than while you were there?

A. She always fills them out and hands them to me.

Q. Okay. And then she puts the original in her file?

A. I would assume she does. I leave at that point when she hands me my copy.

Q. She hands you a copy? Okay. By the way, I don't know if you've looked; do you have a copy of that in your file?

A. I do not. I have -- it's probably somewhere in my office. I do have my appointment card, but I don't have this. It's probably mixed up in other paperwork at the office.

Q. But in any event, we do know, even if it was filled out at a different time, we know that it was filled out sometime either contemporaneously on November 1st, correct, or this took place before?

MR. DIMALINE: Your Honor, we're going

to object to the leading nature of the question.

THE COURT: I beg your pardon?

MR. DIMALINE: The leading nature of the question.

THE COURT: Don't lead your witness.

MS. KRAMER: The only way that it ever occurred with me and Kathy is that I go in there and if she has something, then she knows they don't have an attorney, she fills out the appointment form at that moment and hands it to me.

Q. (By Mr. Fahle) Okay. Is that what happened in this case?

A. Yes.

Q. Now, if you could, is there any possibility that that could have happened that afternoon, the afternoon of November 1st?

A. No.

Q. Why not?

A. Because I never go by the courts in the afternoons asking for appointments.

Q. If such an occurrence happened, would you remember it?

A. If I ever went by a court in the afternoon and asked for a court appointment? Yes.

Q. You do not remember ever having done that?
A. I don't believe I ever have.
Q. In any case?
A. Not in any District Court where I'm wanting something that's coming up on their dockets. No.
Q. Why is that? Why do you go in the morning?
A. Because in the morning is when they're available. If you wait until the afternoon, they've already been appointed attorneys.
Q. Now, tell me what happened when Kathy came up with -- Tell us what happened that morning, exactly.
A. I went in there and I asked her if she had anything and she informed me that she had a case that hadn't been indicted yet but that it involved the death of someone, do you want it, and I said, well, yes. Why wouldn't I want it. She informed me that it concurrently is carrying a case that might get filed where there's a lawyer involved.

MR. DIMALINE: Your Honor, we're going to object to the hearsay of Mrs. Granados that she's testifying to.

MR. FAHLE: Your Honor, this is a

Jackson v. Denno.

THE COURT: Objection overruled. Let's cut it short.

MS. KRAMER: I am, Your Honor. She informed me that the aggravated robbery that was -- that she was aware of, so it must have been on the computer, had an attorney involved and I might not want it because the attorney was involved. I asked her who it was. She said it was Jeffrey Morehouse. I said I did not know him and I would be more than happy to take this case.

Q. (By Mr. Fahle) Okay. You tried -- did you try to get Kathy here this morning to testify to the same?

A. Yes, I did.

Q. Is she available?

A. No, she's not.

Q. When will she be available?

A. Tomorrow.

Q. Morning?

A. I would assume. They told me that she was coming back tomorrow.

Q. She had taken the day off?

A. I didn't ask her where she was.

THE COURT: Can't you all stipulate to these things?

MR. FAHLE: I'm sorry?

THE COURT: Can't you stipulate, the State and the defense? It's just a matter of record, all of this.

MR. FAHLE: Will you stipulate that he asked for an attorney?

THE COURT: She was appointed.

MR. DIMALINE: He asked for an attorney?

MR. FAHLE: I'll show you. Maybe we can, Your Honor.

MR. DIMALINE: On the criminally negligent homicide?

MR. FAHLE: We can stipulate to one thing, Your Honor, and this also is a matter of record, it's Defendant's Exhibit 10. I think we can stipulate that on the 24th day of October, 1994, Bruce Fernandez requested an attorney.

THE COURT: October the 24th, 1994?

MR. FAHLE: Right. Requested an attorney.

THE COURT: The Defendant requested an attorney.

MR. FAHLE: From the personal bond office, it appears. It looks like this is their form. And that that was approved.

THE COURT: Okay. It's been stipulated.

Q. (By Mr. Fahle) I'm sorry, but you did say that Kathy said that this had something to do with Jeff Morehouse?

A. Yes, she did.

Q. And what did it have to do with Jeff Morehouse?

A. That it was an aggravated robbery, and he was the victim.

MR. FAHLE: Pass the witness.

VOIR DIRE EXAMINATION

BY MR. DIMALINE:

Q. Ms. Kramer, your appointment of November 1st, 1994 was clearly on the criminally negligent homicide case?

A. The odd MC number, which is the pre-indictment number, relates only to the criminally negligent homicide.

Q. MC number, that's the warrant number that goes out?

A. I never really knew what MC meant.

Q. In other words, it didn't have a cause number because it wasn't indicted yet.

A. That's correct.

Q. And the aggravated robbery case wasn't pending at the time that you were appointed initially?

A. I don't have any personal knowledge of that. I can only state that I was informed that there was one out there, and by the time I made my first court appearance, there was a semblance of a file for me to look at.

Q. Let me ask you this: Do you know what a sealed case is?

A. Yes.

Q. You've worked in the District Attorney's office, haven't you?

A. Yes.

Q. How long were you a prosecutor?

A. Fourteen months.

Q. Were you ever intake?

A. No.

Q. Did you ever use the computer to do research on defendants that had other cases pending?

A. You mean did I ever look up their JN and see if there was anything there?

Q. Right.

A. I had people do it for me.

Q. What's your understanding of what a sealed case is?

A. You know, to be perfectly honest, I know that it prevents us from being able to look at pertinent data, but other than that, I'm really not all that familiar, not ever having gone through intake.

Q. The reason is because the charges are not formal; is that correct?

A. This is correct.

Q. In other words --

A. As far as I know.

Q. It's under investigation by the grand jury.

A. That is correct. And I believe I spoke with you about that at some point back then.

Q. And court coordinators or clerks don't, aren't able to get that kind of information on sealed cases?

A. I'm sure that she didn't have any pertinent data, but there is no doubt that she was aware that this was there. No doubt.

Q. That what was there?

A. That the ag robbery was hovering out there

somewhere. There's no doubt, because before she appointed me, she wanted to make sure I wanted it to see if I knew who Jeffrey Morehouse was. I'm not talking about the appointment on the criminally -- I mean, I'm not talking about the appointment on the ag robbery. She asked me that at the time that she gave me the appointment on the criminally negligent. I absolutely know that. The ag robbery just naturally flowed later by virtue of me being appointed to him already.

Q. Well, was your client arrested initially on the aggravated robbery case at the time it happened?

A. Of course not.

Q. Of course not. It was an at-large case, wasn't it?

A. Yes. It came in later.

Q. Tell us what the return date on the indictment is.

THE COURT: Which indictment?

MR. DIMALINE: The indictment for cause number 95-CR-0391.

THE COURT: What offense?

MR. DIMALINE: Of aggravated robbery with Bruce Fernandez.

MS. KRAMER: Which date are you referring to?

THE COURT: Have the jury come back at 2:00.

MS. KRAMER: This or this?

Q. (By Mr. Dimaline) This is a return from the grand jury.

A. January 25th, 1995. I never did grand jury.

Q. And you realize when a grand jury returns an indictment on an at-large case where a defendant has not been arrested, that generates a warrant to go out and arrest somebody?

A. You're asking me information that I really don't know anything about. Having not worked in that section of the DA's office, I don't know the procedures in that section of the DA's office.

Q. How long have you been practicing law?

A. Eight years.

Q. And you're not aware of this procedure?

A. That specific DA office procedure, specifically, have I personal knowledge of it? No. I really don't.

Q. As a defense attorney, you're not aware how the grand jury works?

A. Yes. But you're asking me details of the innerworkings of the DA's office. I know that when the grand jury returns a true bill, a warrant goes active. Yes, I know that.

Q. Exactly. And in this case, the warrant couldn't have gone out before January 25th, 1995 in cause number 95-CR-0391, the aggravated robbery case against Bruce Fernandez; is that correct?

A. Yes. But since you're asking me my knowledge, I do believe that cases can be on the computer so that the coordinators are aware of them.

Q. That's not what I'm asking you.

A. Just because the warrant's not there.

Q. That's not what I'm asking you.

A. Yes. A warrant goes active when a true bill is returned.

Q. So he was not arrested until after January 25th, 1995?

A. Well, he was incarcerated already but not on those charges.

Q. Right. In fact, the capias that was returned on this aggravated robbery case, which is in the Court's file and has been judicially noticed by Judge Machado, has a date of January 25th; is that correct, 1995?

A. Yes, it does.

Q. So that's when he was actually arrested and formally placed under arrest for the charge of aggravated robbery against Jeffrey and Diana Morehouse in cause number 95-CR-0391; is that correct?

A. I'm going to assume so. Yes.

Q. He would not have been under arrest for aggravated robbery against those people in this cause number in November of 1994, would he?

A. Not formally. No.

Q. When you say formally, what are you talking about?

A. Well, he was incarcerated and he was obviously being investigated for this; but no, he had not been indicted, therefore, he was not actually sitting in jail under arrest for the ag robbery. He was sitting in jail for the criminally negligent homicide.

Q. Right.

A. Which at that time wasn't even a criminally negligent homicide yet. You all hadn't even decided what to charge him with.

MR. DIMALINE: Thank you, Your Honor. I don't have any further questions.

VOIR DIRE EXAMINATION

BY MR. FAHLE:

Q. You make an interesting point. At that time it wasn't a criminally negligent homicide?

A. No, it was not.

Q. In fact, showing you what's been marked as DX 8 and DX 9, the two indictments that we're talking about and judicially noticed by the Court for this hearing, Mr. Dimaline pointed out and asked you: Well, isn't it true that he wasn't indicted for the ag robbery until January 25th, 1995?

A. Right.

Q. Well, when was he indicted for the criminally negligent homicide?

A. December 20th, 1994. At least that's the date right here.

Q. The file date?

A. Yes.

Q. On the indictment?

A. Yes.

Q. That would appear to be the date that he was indicted?

A. It would.

Q. And so were there no charges pending against him until that date? Was he not under arrest

at all?

A. Oh, no. He had already been incarcerated since October 21st of 1994.

Q. Okay. Regardless which warrant the police officer decided to swear out, right?

A. Exactly.

Q. Because it was all the same facts, correct?

A. Exactly.

Q. One other thing: If these were separate cases; that is, if he had separate lawyers on these cases and you represented him on one of them and another lawyer represented him on the other one, would you just let him take a polygraph on the other case? That is, these are separate cases but with the same facts.

A. Never.

Q. Would you let him just go in and make the statement that the State alleges was made in State's Exhibit 48?

A. If I had any control over the other attorney, no, I would never allow these statements to have been made without an attorney present.

Q. And it wouldn't have mattered -- or would it have mattered to you -- I don't want to lead you.

Would it have mattered to you if the detective who was investigating the case came in and said: I'm only going to ask him about the ag robbery; don't worry, I'm not going to ask him about the criminally negligent homicide? Which is the same facts.

A. It would have mattered a great deal to me.

Q. I mean, then you would have let him make those statements?

A. No. It would have mattered that if he said I'm only going to ask him about the ag robbery and you're only the lawyer on the criminally negligent, I would have said it doesn't matter; it's all the same thing. I insist on being here.

MR. FAHLE: Okay. Pass the witness.

VOIR DIRE EXAMINATION

BY MR. DIMALINE:

Q. Just to clarify for the record, the Defendant, Bruce Fernandez, was arrested on the criminally negligent homicide on an arrest warrant; is that correct?

A. As far as Detective Davis' testimony, I believe that's what he testified to.

Q. That warrant was generated by the Terrell Hills Police Department?

A. I do believe so.

Q. And that was executed on October 21st, 1994?

A. Yes.

Q. In this case, the aggravated robbery case, the Defendant was arrested on a post-indictment fugitive warrant that was issued January 25th, 1995; is that correct?

A. Yes.

Q. Okay. And the date that you were appointed, November the 1st, 1994, did you go to see your client in the jail?

A. No. I knew that he had a court appearance coming up.

Q. When was that?

A. November 22nd.

Q. Okay. When is the first time you met him?

A. November 22nd.

Q. And the day that you received the appointment, you said that you weren't clear exactly the time of the day that you received the appointment?

A. I'm clear as to it was sometime between 8:15 and 9:00 o'clock. That is my normal time to go to the courts and ask for appointments.

Q. But you don't have any independent recollection of getting this appointment at a specific

date?

A. I have --

Q. Specific time on that date?

A. I have an independent recollection of my conversation with Kathy. I clearly remember it. If you're asking me if I have an independent recollection that it was November 1st, I do not. However, she always fills out the forms at the time and hands them to me.

Q. Is there a date on that form or a time on that form?

A. No. There is not.

Q. So it could have been any time from 8:00 to 5:00 on November 1st?

A. No. It could not have been.

Q. But you can't tell us exactly what time you were down here getting that appointment?

A. It was at least before 9:00 o'clock.

Q. The best you recall?

A. I never do it any other way.

Q. You've never done it any other way?

A. I have never gone, except to ask for, in county courts. In District courts, if I want to see if there's anything coming up, I go in the morning because that's when they're making the appointments.

Q. And if this case -- if Kathy would have told you it was an aggravated robbery case, would you have taken it or not?

A. She did inform me there was an aggravated robbery coming.

Q. No. If it was only an arrest for an aggravated robbery, would you have taken the case?

A. Yes, I would have.

MR. DIMALINE: Thank you.

MR. FAHLE: That's it?

MR. DIMALINE: I have nothing further.

VOIR DIRE EXAMINATION

BY MR. FAHLE:

Q. Just two other things: This is interesting. You mentioned court appearances. When was the first court appearance; do you remember?

A. I believe it was November 22nd, 1994.

Q. So that would have been before the date of either indictment, correct?

A. Absolutely.

Q. Okay. Was that the first time that you met Bruce Fernandez?

A. Yes, it was.

Q. Did you all discuss -- did you and Bruce Fernandez, without violating the attorney/client

privilege, but did you discuss the case at the time?

A. Absolutely.

Q. The charges against him?

A. Yes.

Q. Or the non-charges?

A. Yes, we did.

Q. You discussed what had happened?

A. Yes, we did.

Q. And did you, when he started to get into -- I don't know. Let me ask you a hypothetical question, because I don't want to violate his attorney/client privilege. But if a hypothetical defendant in that situation had started to get into the facts of the robbery, would you have stopped him and said: Look, I'm not your lawyer on that?

A. No.

MR. FAHLE: Pass the witness, Your Honor.

VOIR DIRE EXAMINATION

BY MR. DIMALINE:

Q. So you never saw the Defendant between the time you were appointed on November the 1st and his first appearance in Court on the 21st, you said?

A. That is correct.

Q. Why is that?

A. If my memory serves, I believe that I was in trial in Mary Roman's court on a murder case. I didn't really have time.

Q. A 20-day murder case?

A. No. However, it's very, very typical -- I don't you -- Well, you spent a little time as a defense attorney -- to wait on a case that hasn't been indicted -- they're not going anywhere, he wasn't getting out of jail -- to see him at the first court appearance. That is the standard practice of defense attorneys.

Q. You didn't think it was important to see him before he came to court?

A. Not at that time. No.

MR. DIMALINE: Okay. Thank you.

VOIR DIRE EXAMINATION

BY MR. FAHLE:

Q. Would you have thought it important, though, if a police officer had called you and said: I'm going to have him take a polygraph; you probably don't want to be there, do you?

A. The situation would have been completely different, but no one called me to inform me of this.

MR. FAHLE: Okay. Pass the witness, Your Honor.

BY MR. DIMALINE:

Q. Well, you knew that the complainant was a prominent attorney here in town already, didn't you, when you got the appointment?

A. On the aggravated robbery. Yes, I did.

Q. But you didn't bother to go over there and talk to the guy about it before he came to court?

A. I sent my investigator over to talk to him. Yes, I did.

Q. Who is your investigator?

A. Gilbert Carrasco.

Q. When did he go over there?

A. I really don't know. At some point in time throughout this whole thing, probably subsequent to that point in time, he has spoken to Jeffrey Morehouse.

Q. Did your investigator tell you that the Defendant told him that he had made a voluntary statement after he took a polygraph examination?

A. I'm not sure I understand what you're asking me.

Q. Did Gilbert tell you that the Defendant told him that he had given a voluntary statement?

A. Gilbert hadn't spoken with Bruce

Fernandez. Gilbert spoke with Jeffrey Morehouse.

Q. Oh. I misunderstood.

MR. DIMALINE: I don't have any further questions.

MR. FAHLE: I have nothing further, Your Honor.

THE COURT: Thank you.

MS. KRAMER: Thank you, Judge.

THE COURT: Next witness?

MR. FAHLE: May we confer for just a minute, Your Honor? May I confer with the witness?

The defense rests on the Jackson v. Denno motion, Your Honor.

THE COURT: Okay. Both close? Any arguments?

MR. DIMALINE: Can we have just a second, Your Honor?

THE COURT: Yes.

MR. DIMALINE: Judge, can we have five minutes?

THE COURT: Yes.

(Brief recess.)

MR. DIMALINE: I'm sorry, Judge. We're not going to call anybody else.

THE COURT: Okay.

MR. DIMALINE: Can I go on the record before we start?

THE COURT: Yes.

MR. DIMALINE: We're going to withdraw our offer of the second voluntary statement and wish to proceed on the motion, the admissibility of the first statement that was taken.

THE COURT: In other words, you're withdrawing -- you introduced State's Exhibit number 48, that's the second one?

MR. DIMALINE: Yes, sir.

THE COURT: You're withdrawing that.

MR. DIMALINE: Yes, sir. We would like to proceed on the hearing as to the first statement, number 47.

THE COURT: 47. What says the defense?

MR. FAHLE: Your Honor, the problem that we have with 47, obviously, I guess 48 fixes a lot of it, but there's also independent problems with 47. One of the problems is that this Defendant, when he was called by a police officer, was called by the detective, Detective Davis, or his mother was called, they were asked

to come down to the station. They got to the station. The police officer was in the meantime out swearing out a warrant for his arrest, which he had in his possession at the time. And when he comes in to the -- when he comes in, the detective reads to him the rights card, which was Defendant's 4, Defendant's Exhibit 4.

The problem with the rights card, there's a couple of problems. One, it says right at the top of it: Warnings to arrestee or suspect. Secondly, you know, which would indicate to him that he's either an arrestee in this case or he's a suspect. Secondly, though, it never -- there was no testimony that he affirmatively waived his rights before he gave that first statement.

The testimony was the following: That he was read the rights card; that he said he understood his rights; and the last line on that rights card, Defendant's 4, is: Do you understand these rights as I have given them to you. There is no: And do you wish to waive these rights, do you wish to give up these rights on there.

The detective never said that he said:

I wish to waive these rights, I wish to give up these rights, or that he was ever asked that before he gave the statement. The first time he was asked that was when he signed the written statement, the written statement, which is clearly the fruit of the first oral statement that he gave to the detective. I mean, it is so clear. I asked the detective: What you all did was, you had him say what he wanted; you cleared it up by interrogating him and asking him questions; and then you all wrote it down; and then finally he waives his rights. That's the first time he made an affirmative waiver of his rights.

And the case law is clear, Your Honor, I just argued this yesterday in the Court of Appeals, that mere acquiescence, merely going forward and giving the statement is not enough to show an affirmative waiver of rights. It has to be actually affirmatively waived. So there is -- there are tons of United States Supreme Court cases that I'll be happy to bring the Court in ten minutes. I've got them out in my car because I just finished arguing this. They have to show affirmative waiver, and they didn't

do that in this case. There was simply no testimony to that effect.

THE COURT: Okay. What says the State?

MS. PARKER: Well, Your Honor, we would argue, first of all, that the first statement, State's Exhibit number 47, was not custodial. They called his mother, said they were investigating a crime. She said: Fine, we'll come over, and she brought him in. And he came in of his own free will. The police didn't go pick him up.

Although it was not custodial, we have complied with 38.22. He was given his rights; he was asked if he understood them. If you look at State's Exhibit number 47 in the paragraph just below the rights it says: Prior to and during the making of the statement I have and do hereby knowingly, intelligently and voluntarily waive the above explained rights and do make the follow voluntary statement of my own free will.

We're not seeking to introduce the oral statement that he made to the detective when they were talking about what they were going to do in this case or what his statement

was going to be. We're seeking to introduce the written statement. He was given his rights beforehand, and he freely waived those rights as evidenced by his putting his initials by each of the rights, initialing each of the paragraphs along the way, and by signing it at the end.

There's no evidence that he was coerced in any way. He voluntarily went to the police station, and he was not under arrest. So we would argue that State's Exhibit 47 is admissible. It was not -- he was not in custody, and we have complied with 38.22.

MR. FAHLE: Your Honor, could I just respond very briefly?

THE COURT: That was the closing, but go ahead. Very briefly. Go on.

MR. FAHLE: Two just quick points.

THE COURT: That's the one you withdrew.

MS. PARKER: Right.

MR. FAHLE: First, on the issue of whether or not he was under arrest, there is Texas case law that says that -- sorry, Stansberry versus California is the case, a United States Supreme Court case that came out

in 1994 -- that says that where a police officer does not inform someone that they're a suspect or an arrestee, but they have that perception in their own mind, where the police officer has that perception in their own mind, that's one thing. So where they're inform of it. But he took it out and he said he read him that whole rights card, and it says right at the top: Warning to arrestee or suspect. Where they are informed, that does figure into the calculation.

The other thing is, on the waiver issue, see, the problem is that State's Exhibit 47 is simply evidence of the statement. It's not the statement itself. That's the reducing of the statement to writing. The statement was what he told the detective in response to the custodial interrogation. That's what the statement is. Then they reduce it to writing. This waiver -- I was real clear with this detective. That's what took me so long with him, because I had to get exactly: When did you ask -- when was the first time we got an affirmative waiver of his rights. The first time we got an affirmative waiver was when he signed State's Exhibit 47. That was long after

the statement had been given.

In the alternative, State's Exhibit number 47 is nothing but the fruits of the first statement, the oral statement. So for them to now say, oh, no. That's like saying these are separate crimes. These are separate statements. It's the same words. It's five seconds later. Okay. Let's write down what you just said. Give it to me again. They can't say that that first oral statement is not the statement. He was not warned before giving the statement. Sorry. He was warned; he didn't waive his rights before giving the statement. And that's all I have.

MS. PARKER: May I respond briefly?

THE COURT: You may.

MS. PARKER: Your Honor, they had every opportunity to put their defendant on the stand. They have the Defendant's mother in the hall who took him to the police station. If he had been coerced in any way into making that statement, they could have brought that evidence, but there is absolutely no evidence of that. The only evidence is that he voluntarily made a statement. And we would argue that his

first statement, State's Exhibit 47, is admissible; that 38.22 was complied with; he was not under arrest at the time. He voluntarily went in to assist them with their investigation, along with his mother.

MR. FAHLE: Coercion is not the issue, Judge.

THE COURT: On this Jackson/Denno, Suzanne, you have the wrong order. I'm looking to see. There was an order concerning discovery. I'm looking at the discovery.

MS. KRAMER: We never had any order on discovery because they gave me full discovery as far as the file.

THE COURT: The order that you filed with the motion is not --

MS. KRAMER: Did I put the wrong order on the back of the Jackson v. Denno?

THE COURT: Yeah. I was going through all the motions looking for that, looking for the order.

MS. PARKER: Your Honor, here's an order that was attached to cause number 94-CR-7497, which is the criminally negligent homicide, if you want to strike out the cause

number and use that order.

MS. KRAMER: It says Jackson v. Denno on it.

MS. PARKER: It says motion to suppress.

THE COURT: Okay. That polygraph doesn't come in until a little before the second statement, right? You have withdrawn that one. The Court is going to rule that State's Exhibit number 47, which is the first statement made by the defendant, was freely and voluntarily made. I'll see you all at 2:00 o'clock; okay?

(Recess.)

(Jury enters the courtroom.)

THE COURT: Please have a seat. Welcome back. I haven't seen you since last night. Please bear with me. After the case is over with, I'll explain to you what happened this morning. I can't explain to you until after the case is over with. Please bear with me. The State's ready?

MS. PARKER: State's ready.

THE COURT: Defense ready?

MS. KRAMER: Defense is ready.

THE COURT: Bring the next witness,